CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 729

DANIEL W. O'DONOGHUE

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

FILED FEBRUARY 24, 1933

(37,426)

(37,426)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1933

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42232

DANIEL W. O'DONOGHUE

v.

THE UNITED STATES

STATEMENT OF FACTS AND CERTIFICATE

Messrs. John S. Flannery, Daniel W. O'Donoghue, Jr., John W. Davis, and George E. Hamilton appeared for the plaintiff.

Messrs. H. B. Holland and Charles F. Kincheloe appeared for the defendant.

Before Acting Chief Justice Green, Judge Littleton, Judge Whaley (Judge Williams taking no Part; Chief Justice Booth Taking no Part on Account of Illness)

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following:

The plaintiff, Daniel W. O'Donoghue, has duly filed his petition in the Court of Claims on the nineteenth day of January, 1933, in which he claims and asks judgment against the United States in the sum of $500, as salary due him for the months of July to December, 1932, inclusive, all of which will more particularly appear from his said petition, a copy of which accompanies this certificate and is marked "Exhibit A".

[fol. 2] The petition of plaintiff, among other things, alleges in substance that on February 23, 1932, he was appointed by the President of the United States, an Associate Justice of the Supreme Court of the District of Columbia, by and with the consent of the Senate, and on the twenty-ninth day of February, 1932, duly qualified as such Associate Justice and ever since said date has been engaged in the performance of his duties as such Associate Justice of the Supreme Court of the District of Columbia.

From and after the date of his appointment and entry upon his duties he received a salary as Associate Justice of the Supreme Court of the District of Columbia at the rate of $10,000 a year until June 30, 1932, pursuant to the provisions of the Act of December 13, 1926, "to fix the salaries of certain Judges of the United States" (44 Stat. 919-920).

From and after July 1, 1932, and for the months of July, August, September, October, November, and December, 1932, his salary and compensation was reduced ten per cent pursuant to a ruling of the Comptroller General, and by reason of which $500 of his salary for the period above mentioned is unpaid. The ruling of the Comptroller General was based upon the Act approved June 30, 1932, making appropriations for the legislative branch of the Government for the fiscal year ending June 30, 1933 (47 Stat. 382, 399), in which was incorporated certain provisions known as the Economy Bill. In said ruling, the Comptroller General held, among other things, that the Supreme [fol. 3] Court and Court of Appeals of the District of Columbia were "legislative" and not "constitutional" courts entitled to the protection of Section 1, Article III, of the Constitution, and that the compensation of Justices thereof could be diminished.

Plaintiff further avers in his petition that the said courts of the District of Columbia are inferior courts of the United States, created and established by virtue of the provisions of Article III, Section 1, of the Constitution thereof, and by reason of the provisions therein contained the aforesaid deduction from his compensation was contrary to the provisions of the Constitution and unlawful.

Plaintiff is the owner of the claim, of which there has been no assignment or transfer and has at all times borne true allegiance to the Government of the United States and never in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and is a citizen of the United States.

To this petition, the defendant has filed a demurrer on the following grounds:

"1. The petition does not state a cause of action against the defendant within the jurisdiction of this court.

2. The petition does not state a cause of action against the defendant.

[fol. 4] 3. The defendant specially demurs to said petition for the reasons that—

(a) The justices of the Supreme Court of the District of Columbia are not judges of "inferior courts" within the meaning of Section 1 of Article 3 of the Constitution of the United States, and are, therefore, not "officers whose compensation may not, under the Constitution, be diminished during their continuance in office" within the meaning of Section 104 (a) of the Act of June 30, 1932, c. 314, 47 Stat. 382, 400.

(b) Said petition does not set forth facts sufficient to give rise to an implied agreement between plaintiff and defendant that plaintiff's compensation should not be reduced during his continuance in office.

(c) Plaintiff's compensation being payable, under the Act of June 29, 1932, c. 308, 47 Stat. 343, 368, out of revenues appropriated for activities of the District of Columbia, plaintiff's sole cause of action, if any, is against the District of Columbia, and is, therefore, not within the jurisdiction of this Court.

(d) In so far as the petition seeks the determination of questions not involving the Constitution of the United States, the jurisdiction of this Court is barred by Section 111 of the Act of June 30, 1932, c. 314, 47 Stat. 382, 403."

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the [fol. 5] record before it the Court finds it necessary for a proper disposition of the case that certain constitutional questions should be determined. These constitutional questions are as follows:

QUESTIONS CERTIFIED

I. Does Section 1, Article III, of the Constitution of the United States apply to the Supreme Court of the District of Columbia and forbid a reduction of the compensation of the Justices thereof during their continuance in office?

II. Can the compensation of a Justice of the Supreme Court of the District of Columbia be lawfully diminished during his continuance in office?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above questions and certify and transmit the same to the Court of Claims of the United States for its guidance in the further progress of the case.

Wm. R. Green, Acting Chief Justice. Benjamin H. Littleton, Judge. Richard S. Whaley, Judge.

[fol. 6] EXHIBIT "A" TO CERTIFICATE

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42232

DANIEL W. O'DONOGHUE

vs.

THE UNITED STATES

PETITION

The plaintiff, Daniel W. O'Donoghue respectfully states:

I. He is a citizen of the United States and a resident of the District of Columbia.

II. Plaintiff was given by the President of the United States an ad interim appointment as Associate Justice of the Supreme Court of the District of Columbia on October 28th, 1931, and thereafter was nominated and by and with the advice and consent of the Senate was permanently appointed by the President of the United States on February [fol. 7] 23, 1932, as an Associate Justice of the Supreme Court of the District of Columbia and thereafter on the 29th day of February, 1932, duly qualified as such Associate Justice and ever since said date has been actively engaged in the performance of his duties as such Associate Justice of the Supreme Court of the District of Columbia.

III. Plaintiff was so permanently appointed and commissioned to hold said office during good behavior and at the time of his appointment the salary of the office of an Associate Justice was permanently fixed at the rate of Ten Thousand Dollars ($10,000) per annum by the Act of Congress approved December 13th, 1926, "to fix the salaries of certain Judges of the United States" (44 Stats. 919-920).

Under the provisions of Section 714 of the Revised Statutes of the United States, as amended—which was derived from the Act of April 10th, 1869 (C. 22, Sec. 5, 16 Stats. 45), and is now Section 260 of the Judicial Code and Section 375 of the United States Code—as further compensation for services rendered and to be rendered, the plaintiff, after having held a commission as Justice of said Court for at least ten years continuously, and upon attaining the age of 70 years, was given the right to resign and to thereafter receive during the residue of his natural life the salary payable at the time of such resignation for the office that he then held, or, instead of resigning, to retire from active service on the Bench upon the salary of which he was in receipt at the time of such retirement.

IV. Plaintiff further states that at the time of his appointment he was, and had been for many years, engaged [fol. 8] in the general practice of the law before the Supreme Court of the United States and all the Courts of the District of Columbia, and that he was induced to relinquish the greater emoluments of private practice for public service upon the Bench because from his knowledge of the decisions of this Court and of the Supreme Court of the United States he understood and believed that the Supreme Court of the District of Columbia was an inferior Court of the United States created under Section 1, Art. III of the Constitution and that under said Section 1 he would receive a compensation which could not be diminished during his continuance in said office and that when eligible to retire or resign under the Retirement Act aforesaid he would continue thereafter to receive for the remainder of his life the compensation to which he was entitled on the date of such retirement or resignation without diminution.

V. From the date of his appointment as aforesaid plaintiff was paid the salary of the office as so fixed to and in-

cluding December 31st, 1932, less deductions hereinafter mentioned. By the Act "making appropriations for the Government of the District of Columbia and other activities chargeable in whole or in part against the revenues of such District for the fiscal year ending June 30th, 1933, and for other purposes," approved June 29th, 1932 (47 Stats. 343, 368), appropriation was made by the Congress to pay the compensation of the plaintiff and other Justices of the various Courts in the District of Columbia, and plaintiff [fol. 9] is informed and avers that there are sufficient funds in the Treasury of the United States available for such purpose.

In the Act approved June 30th, 1932, "making appropriation for the legislative branch of the Government for the fiscal year ending June 30th, 1933" (47 Stats. 382, 399), the Congress incorporated certain provisions known as the Economy Bill and on or about the 13th of July, 1932, as plaintiff is informed and avers, the Comptroller General of the United States made a ruling in which he held, among other things, that the Supreme Court and Court of Appeals of the District of Columbia were "legislative" and not "constitutional" Courts entitled to the protection of Section 1, Art. III, of the Constitution and that the compensation of the Justices thereof, whether active, retired, or resigned, could be diminished.

The Disbursing Officer of the Department of Justice pursuant to said ruling of the Comptroller General reduced the aforesaid annual compensation to which plaintiff was entitled by the deduction of ten per cent (10%) thereof and, notwithstanding his protest, plaintiff was paid at this reduced rate for the months of July, August, September, October, November and December, 1932, whereby he has suffered a loss of compensation to which he is justly entitled in the sum of Five Hundred Dollars ($500) and is informed that similar deductions will continue to be made in the future. Plaintiff is also informed and avers that similar deductions have been made and will continue to be made from the salaries of his Associate Justices and [fol. 10] from the compensation of Walter I. McCoy, former Chief Justice, and Wendell P. Stafford, former Associate Justice of the Supreme Court of the District of Columbia, who retired December 8th, 1929, and May 2nd, 1931, re-

spectively, after becoming eligible to do so under the provisions of the aforesaid Retirement Act then in force.

VI. Plaintiff is advised and avers that the ruling of the Comptroller General aforesaid, and the deductions from the salary of plaintiff made by the disbursing officer of the Department of Justice pursuant thereto, are contrary to and in direct violation of the terms of the so-called Economy Bill of June 30, 1932, aforesaid, because

(1) Section 106 of said Economy Bill specifically applies only to "the *retired pay* of all Judges" and plaintiff has not retired but is actively engaged in the performance of the duties of his office, and Section 107 (5) of said Economy Bill specifically applies only to "*salaries and retired pay* of all Judges (except Judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate *exceeding $10,000 per annum*, shall be at the rate of $10,000 per annum, and,

(2) in that the said act specifically excepts from the operation of the provisions thereof judges whose compensation may not, under the Constitution, be diminished during their continuance in office;"

that plaintiff is such a judge whose compensation may not, under the Constitution, be diminished during his continu-[fol. 11] ance in office; and that therefore the said ruling of the Comptroller General, and the deductions of the disbursing officer of the Department of Justice pursuant thereto, are contrary to law and illegal.

VII. Plaintiff is advised and avers that the ruling of the Comptroller General that the salary of plaintiff may be diminished during his continuance in office, and the deductions aforesaid of the disbursing officer of the Department of Justice from the salary of plaintiff resulting in diminution of plaintiff's compensation during his continuance in office, contravene the Constitution of the United States and are therefore unconstitutional, illegal, and void, in that plaintiff having been appointed to serve during good behavior may not be removed except by impeachment and his compensation may not, under the Constitution, be diminished during his continuance in office.

VIII. Plaintiff is advised and avers that the ruling of the Comptroller General that the salary of plaintiff may be diminished during his continuance in office, and the deductions aforesaid of the disbursing officer of the Department of Justice from the salary of plaintiff resulting in diminution of plaintiff's compensation during his continuance in office, contravene the Constitution of the United States and are therefore unconstitutional, illegal, and void, in that plaintiff is a judge of an inferior court of the United States within the terms of Article III of the Constitution, namely, the Supreme Court of the District of Columbia, whose compensation may not be diminished during his continuance in office.

[fol. 12] Plaintiff states that the said Supreme Court of the District of Columbia is vested by acts of Congress with all the jurisdiction and all the power conferred by the Constitution under Article III on the United States, and that the powers so conferred on the United States by said Article have been exercised by the Court of Appeals from its organization and by the Supreme Court of the District of Columbia, and its predecessor courts, from the establishment of the government. Plaintiff therefore charges that in the organization of the courts of the District of Columbia, the Congress of the United States acted by virtue of Article III of the Constitution and thereby constituted said courts inferior courts of the United States, and to the extent and only to the extent that Congress has enlarged and extended the powers of said courts did it act under any other than Article III.

Plaintiff therefore avers that the said Courts of the District of Columbia, to the extent that they exercise all the judicial powers granted to the United States, are inferior courts of the United States under said judiciary provision of the Constitution, and that they are none the less inferior courts under the said article of the Constitution because, by reason of their location at the seat of government, Congress, under Article I, section 8, has conferred upon them powers and jurisdiction which it may not confer upon other Federal courts.

IX. Plaintiff further states that while reluctant to institute a suit which may result in personal benefit to himself, [fol. 13] he feels that it is his duty to the Court, to the Bar

and to the people of the District of Columbia to have the status of the Court defined and settled as soon as it may be possible.

X. Plaintiff is further advised and avers that his right to recover the amount of compensation so unlawfully deducted is founded upon the Constitution of the United States, the Acts of Congress hereinbefore referred to fixing the compensation of the Associate Justices of the Supreme Court of the District of Columbia, upon Section 714 of the Revised Statutes of the United States, as amended, and also upon an implied contract between the plaintiff and the United States arising from his acceptance and discharge of the duties of such office as aforesaid.

XI. Plaintiff further states that he is the legal owner of the claim for said compensation so deducted and that there has been no assignment of the whole or any part thereof; that so far as he knows, no action has been had thereon either in the Congress or in any of the Departments of the Government; that he is justly entitled to the amount claimed, excluding all just credits and offsets; that he has at all times borne true faith and allegiance to the Government of the United States, and has not at any time voluntarily aided, abetted or given encouragement to rebellion against it.

XII. Plaintiff further states that on or about May 25th, 1903, in the case of Harriet T. James v. United States (38 Ct. Cls. 615) this Court, in a carefully considered opinion rendered by Judge Howry, reviewed the status of said [fol. 14] Supreme Court of the District of Columbia and held that it was one of the inferior courts of the United States permanently established under Section 1, Art. III, of the Constitution—a repository of a part of the judicial power of the United States—and that the Justices thereof were entitled to the constitutional guarantee of judicial independence arising from tenure of office and permanence in salary and that such court was not merely a legislative creation wholly established under the exclusive power of legislation over the District of Columbia conferred upon the Congress by Section 8, Article I, of the Constitution. Upon appeal to the Supreme Court of the United States (202 U. S. 401) that Court held that the statute in question cov-

ered the compensation payable to Justice James without passing upon or disaffirming the views expressed by this Court as to the constitutional character of the Supreme Court of the District of Columbia.

As the ruling and decision of the Comptroller General, which resulted in the deduction aforesaid and has given rise to this claim, is in direct conflict with the decision of this Court in the James case and cites the decision of the Supreme Court in Ex parte Bakelite Corporation (279 U. S. 438), in which there are some expressions seemingly in conflict with the decision in the James case, and also with the decision of the Court of Appeals of the District of Columbia in Pitts v. Peak, 50 Fed. (2d) 485, and the decision of the Supreme Court of the United States in Claiborne-Annapolis Ferry Company v. United States, 285 U. S. 382 (in which said Pitts case is cited with approval), and as the questions [fol. 15] involved in this and the companion case instituted on behalf of the Justices of the Court of Appeals of the District of Columbia are of great importance not only to the Justices particularly concerned but also to the Bar and citizens of the District of Columbia, as well as to the National Government, and as it is necessary to all concerned that there should be a prompt determination of the status of the courts of the District of Columbia, and, furthermore, as there can be no dispute about the facts, plaintiff respectfully requests that this Court certify the questions of law involved to the Supreme Court of the United States for consideration and decision under the provisions of Section 3(a) of the Act of February 13th, 1925.

XIII. Wherefore, the premises considered, plaintiff prays the award and judgment of this Honorable Court that he is entitled to have and recover of the United States the sum of Five Hundred Dollars ($500), as above demanded, and that he may be given such other and further relief as the nature of his case may require or the Court may deem just.

Daniel W. O'Donoghue, Plaintiff. John S. Flannery, Daniel W. O'Donoghue, Jr., Attorneys for Plaintiff. John W. Davis, George E. Hamilton, of Counsel.

[fol. 16] *Duly sworn to by Daniel W. O'Donoghue. Jurat omitted in printing.*

[fols. 17 & 18] CLERK'S CERTIFICATE

I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of Daniel W. O'Donoghue v. The United States, No. 42,232, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 24th day of February, A. D. 1933.

Willard L. Hart, Clerk Court of Claims of the United States. (Seal Court of Claims.)

Endorsed on cover. File No. 37,426. Court of Claims. Term No. 729. Daniel W. O'Donoghue, vs. The United States. Certificate. Filed February 24, 1933. File No. 37,426.

CLERK'S COPY

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 730

WILLIAM HITZ

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

FILED FEBRUARY 24, 1933

(37,427)

(37,427)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 730

WILLIAM HITZ

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1933

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42233

WILLIAM HITZ

v.

THE UNITED STATES

STATEMENT OF FACTS AND CERTIFICATE

Messrs. John W. Davis, George E. Hamilton, and John S. Flannery appeared for the plaintiff.

Messrs. H. B. Holland and Charles F. Kincheloe appeared for the defendant.

Before Acting Chief Justice Green, Judge Littleton, Judge Whaley (Judge Williams Taking no Part; Chief Justice Booth Taking no Part on Account of Illness).

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following:

The plaintiff, William Hitz, has duly filed his petition in the Court of Claims on the nineteenth day of January, 1933, in which he claims and asks judgment against the United States in the sum of $1,250, as salary due him for the months of July to December, 1932, inclusive, all of which will more particularly appear from his said petition, a copy of which accompanies this certificate and is marked "Exhibit A".

[fol. 2] The petition of plaintiff, among other things, alleges in substance, that on December 5, 1930, he was appointed by the President of the United States, an Associate Justice of the Court of Appeals of the District of Columbia, by and with the consent of the Senate, and on February 13, 1931, duly qualified as such Associate Justice and ever since said date has been engaged in the performance of his duties as such Associate Justice of the Court of Appeals of the District of Columbia.

From and after the date of his appointment and entry upon his duties he received a salary as Associate Justice

of the Court of Appeals of the District of Columbia at the rate of $12,500 a year until June 30, 1932, pursuant to the provisions of the Act of December 13, 1926, "to fix the salaries of certain Judges of the United States" (44 Stat. 919-920).

From and after July 1, 1932, and for the months of July, August, September, October, November, and December, 1932, his salary and compensation was reduced twenty per cent pursuant to a ruling of the Comptroller General, and by reason of which $1,250 of his salary for the period above mentioned is unpaid. The ruling of the Comptroller General was based upon the Act approved June 30, 1932, making appropriations for the legislative branch of the Government for the fiscal year ending June 30, 1933 (47 Stat. 382, 399), in which was incorporated certain provisions known as the Economy Bill. In said ruling, the Comptroller General held, among other things, that the [fol. 3] Supreme Court and Court of Appeals of the District of Columbia were "legislative" and not "constitutional" courts entitled to the protection of Section 1, Article III, of the Constitution, and that the compensation of Justices thereof could be diminished.

Plaintiff further avers in his petition that the said courts of the District of Columbia are inferior courts of the United States, created and established by virtue of the provisions of Article III, Section 1, of the Constitution thereof, and by reason of the provisions therein contained the aforesaid deduction from his compensation was contrary to the provisions of the Constitution and unlawful.

Plaintiff is the owner of the claim, of which there has been no assignment or transfer and has at all times borne true allegiance to the Government of the United States and never in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and is a citizen of the United States.

To this petition, the defendant has filed a demurrer on the following grounds:

"1. The petition does not state a cause of action against the defendant within the jurisdiction of this Court.

2. The petition does not state a cause of action against [fol. 4] the defendant.

3. The defendant specially demurs to said petition for the reasons that—

(a) The justices of the Court of Appeals in the District of Columbia are not judges of 'inferior courts' within the meaning of Section 1 of Article 3 of the Constitution of the United States, and are, therefore, not 'judges whose compensation may not, under the Constitution, be diminished during their continuance in office' within the meaning of Section 107 (a) (5) of the Act of June 30, 1932, c. 314, 47 Stat. 382, 402.

(b) Said petition does not set forth facts sufficient to give rise to an implied agreement between plaintiff and defendant that plaintiff's compensation should not be reduced during his continuance in office.

(c) Plaintiff's compensation being payable under the Act of June 29, 1932, c. 308, 47 Stat. 343, 368, out of revenues appropriated for activities of the District of Columbia, plaintiff's sole cause of action, if any, is against the District of Columbia and is, therefore, not within the jurisdiction of this Court."

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the record before it the Court finds it necessary for a proper disposition of the case that certain constitutional questions should be determined. These constitutional questions are as follows:

[fol. 5] QUESTIONS CERTIFIED

I. Does Section 1, Article III, of the Constitution of the United States apply to the Court of Appeals of the District of Columbia and forbid a reduction of the compensation of the Justices thereof during their continuance in office?

II. Can the compensation of a Justice of the Court of Appeals of the District of Columbia be lawfully diminished during his continuance in office?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above questions and certify and transmit the same to the

Court of Claims of the United States for its guidance in the further progress of the case.

Wm. R. Green, Acting Chief Justice. Benjamin H. Littleton, Judge. Richard S. Whaley, Judge.

[fol. 6] EXHIBIT "A" TO CERTIFICATE

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42233

WILLIAM HITZ

v.

THE UNITED STATES

PETITION

The plaintiff, William Hitz, respectfully states:

I. He is a citizen of the United States and a resident of the District of Columbia.

II. Plaintiff was appointed by the President an Associate Justice of the Court of Appeals of the District of Columbia December 5th, 1930, duly confirmed by the Senate January 28th, 1931, and qualified on, to wit, February 13th, 1931 (under a commission dated February 6th, 1931), and ever since has been actively engaged in the performance of the duties of such Associate Justice.

[fol. 7] III. Plaintiff was appointed, confirmed and commissioned to hold said office during good behavior and at the time of his appointment the salary of the office of an Associate Justice of the Court of Appeals of the District of Columbia was permanently fixed at the rate of Twelve Thousand Five Hundred Dollars ($12,500) per annum by the Act of Congress approved December 13th, 1926, "to fix the salaries of certain Judges of the United States" (44 Stats. 919-920).

Under the provisions of Section 714 of the Revised Statutes of the United States, as amended—which was derived from the Act of April 10th, 1869 (C. 22, Sec. 5, 16 Stats. 45), and is now Section 260 of the Judicial Code and Section 375

of the United States Code—as further compensation for services rendered and to be rendered, the plaintiff, after having held a commission as Justice of said Court for at least ten years continuously, and upon attaining the age of 70 years, was given the right to resign and to thereafter receive during the residue of his natural life the salary payable at the time of such resignation for the office that he then hold, or, instead of resigning, to retire from active service on the Bench upon the salary of which he was in receipt at the time of such retirement.

IV. Plaintiff further states that at the time of his appointment he was, and had been for many years, a Justice of the Supreme Court of the District of Columbia, and had frequently been called upon to consider the history and status of the Courts of said District, that when tendered the position upon the Court of Appeals of the District of [fol. 8] Columbia he understood and believed, from his knowledge of the decisions of this Court and of the Supreme Court of the United States, that said Courts of the District of Columbia were inferior Courts of the United States created under Section 1, Art. III, of the Constitution, and that under Section 1 of said Article he would receive a compensation which could not be diminished during his continuance in said office of Associate Justice of the Court of Appeals and that when eligible to retire or resign under the Retirement Act aforesaid he would continue thereafter to receive for the remainder of his life the compensation to which he was entitled on the day of such retirement or resignation without diminution.

V. From the date of his appointment and qualification plaintiff was paid the salary of the office as so fixed to and including December 31st, 1932, less deductions hereinafter mentioned. By the Act "making appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of such District for the fiscal year ending June 30th, 1933, and for other purposes," approved June 29th, 1932 (47 Stats. 343, 368), appropriation was made by the Congress to pay the compensation of the plaintiff and other Justices of the various Courts in the District of Columbia, and plaintiff is informed and avers that there are sufficient funds in the Treasury of the United States available for such purpose.

In the Act approved June 30th, 1932, "making appropriation for the legislative branch of the Government for the [fol. 9] fiscal year ending June 30th, 1933" (47 Stats. 382, 399), the Congress incorporated certain provisions known as the Economy Bill and on or about the 13th of July, 1932, as plaintiff is informed and avers, the Comptroller General of the United States made a ruling in which he held, among other things, that the Court of Appeals and Supreme Court of the District of Columbia were "legislative" and not "constitutional" Courts entitled to the protection of Section 1, Art. III, of the Constitution, and that the compensation of the Justices thereof whether active, retired or resigned, could be diminished.

The Disbursing Officer of the Department of Justice pursuant to said ruling of the Comptroller General reduced the aforesaid annual compensation to which plaintiff was entitled by the deduction of twenty per cent (20%) thereof and, notwithstanding his protest, plaintiff was paid at this reduced rate for the months of July, August, September, October, November and December, 1932, whereby he has suffered a loss of compensation to which he is justly entitled in the sum of Twelve Hundred and Fifty Dollars ($1,250) and is informed that similar deductions will continue to be made in the future. Plaintiff is also informed and avers that similar deductions have been made and will continue to be made from the salaries of his Associate Justices.

VI. Plaintiff is advised and avers that the ruling of the Comptroller General aforesaid, and the deductions from the salary of plaintiff made by the disbursing officer of the Department of Justice pursuant thereto, are contrary to [fol. 10] and in direct violation of the terms of the so-called Economy Bill of June 30, 1932, aforesaid, in that the said act specifically excepts from the operation of the provisions thereof judges whose compensation may not, under the Constitution, be diminished during their continuance in office; that plaintiff is such a judge whose compensation may not, under the Constitution, be diminished during his continuance in office; and that therefore the said ruling of the Comptroller General, and the deductions of the disbursing officer of the Department of Justice pursuant thereto, are contrary to law and illegal.

VII. Plaintiff is advised and avers that the ruling of the Comptroller General that the salary of plaintiff may be diminished during his continuance in office, and the deductions aforesaid of the disbursing officer of the Department of Justice from the salary of plaintiff resulting in diminution of plaintiff's compensation during his continuance in office, contravene the Constitution of the United States and are therefore unconstitutional, illegal, and void, in that plaintiff having been appointed to serve during good behavior may not be removed except by impeachment and his compensation may not, under the Constitution, be diminished during his continuance in office.

VIII. Plaintiff is advised and avers that the ruling of the Comptroller General that the salary of plaintiff may be diminished during his continuance in office, and the deductions aforesaid of the disbursing officer of the Department [fol. 11] of Justice from the salary of plaintiff resulting in diminution of plaintiff's compensation during his continuance in office, contravene the Constitution of the United States and are therefore unconstitutional, illegal, and void, in that plaintiff is a judge of an inferior court of the United States within the terms of Article III of the Constitution, namely, the Court of Appeals of the District of Columbia, whose compensation may not be diminished during his continuance in office.

Plaintiff states that the said Court of Appeals of the District of Columbia is vested by acts of Congress with all the jurisdiction and all the power conferred by the Constitution under Article III on the United States, and that the powers so conferred on the United States by said Article have been exercised by the said Court of Appeals from its organization and by the Supreme Court of the District of Columbia, and its predecessor courts, from the establishment of the Government. Plaintiff therefore charges that in the organization of the courts of the District of Columbia, including the said Court of Appeals, the Congress of the United States acted by virtue of Article III of the Constitution and thereby constituted said courts inferior courts of the United States, and to the extent and only to the extent that Congress has enlarged and extended the powers of said courts did it act under any other than Article III.

Plaintiff therefore avers that the said Court of Appeals of the District of Columbia, to the extent that it exercises all the judicial powers granted to the United States, is an inferior court of the United States under said judiciary [fol. 12] provision of the Constitution, and that it is none the less an inferior court under the said article of the Constitution because, by reason of its location at the seat of Government, Congress, under Article I, Section 8, has conferred upon it powers and jurisdiction which it may not confer upon other Federal courts.

IX. Plaintiff further states that while reluctant to institute a suit which may result in personal benefit to himself, he feels that it is his duty to the Court, to the Bar, to the citizens of the District of Columbia and to the people of the United States to have the status of the Court of Appeals, as an important national as well as local tribunal, defined and settled as soon as it may be possible.

X. Plaintiff is further advised and avers that his right to recover the amount of compensation so unlawfully deducted is founded upon the Constitution of the United States, the acts of Congress hereinbefore referred to fixing the compensation of the Justices of the Court of Appeals of the District, upon Section 714 of the Revised Statutes of the United States, as amended, and also upon an implied contract between the plaintiff and the United States arising from his acceptance and discharge of the duties of such office as aforesaid.

XI. Plaintiff further states that he is the legal owner of the claim for said compensation so deducted and that there has been no assignment of the whole or any part thereof; that so far as he knows, no action has been had thereon [fol. 13] either in the Congress or in any of the Departments of the Government; that he is justly entitled to the amount claimed, excluding all just credits and offsets; that he has at all times borne true faith and allegiance to the Government of the United States, and has not at any time voluntarily aided, abetted or given encouragement to rebellion against it.

XII. Plaintiff further states that on or about May 25th, 1903, in the case of Harriet T. James v. United States (38

Ct. Cls. 615), this Court, in a carefully considered opinion rendered by Judge Howry, reviewed the status of said Supreme Court of the District of Columbia and held that it was one of the inferior courts of the United States permanently established under Section 1, Art. III, of the Constitution—a repository of a part of the judicial power of the United States—and that the Justices thereof were entitled to the constitutional guarantee of judicial independence arising from tenure of office and permanence in salary and that such court was not merely a legislative creation wholly established under the exclusive power of legislation over the District of Columbia conferred upon the Congress by Section 8, Article I, of the Constitution. Upon appeal to the Supreme Court of the United States (202 U. S. 401) that Court held that the statute in question covered the compensation payable to Justice James without passing upon or disaffirming the views expressed by this Court as to the constitutional character of the Supreme Court of the District of Columbia.

As the ruling and decision of the Comptroller General, which resulted in the deduction aforesaid and has given rise [fol. 14] to this claim, is in direct conflict with the decision of this Court in the James case and cites the decision of the Supreme Court in ex parte Bakelite Corporation (279 U. S. 438), in which there are some expressions seemingly in conflict with the decision in the James case and also with the decision of the Court of Appeals of the District of Columbia in Pitts v. Peak, 50 Fed. (2d) 485, and the decision of the Supreme Court of the United States in Claiborne-Annapolis Ferry Company v. United States, 285 U. S. 382 (in which said Pitts case is cited with approval), and as the questions involved in this and the companion case instituted on behalf of the Justices of the Supreme Court of the District of Columbia are of great importance not only to the Justices particularly concerned but also to the Bar and citizens of the District of Columbia, as well as to the National Government, and as it is necessary to all concerned that there should be a prompt determination of the status of the courts of the District of Columbia, and, furthermore, as there can be no dispute about the facts—plaintiff respectfully requests that this Court certify the questions of law involved to the Supreme Court of the United States for consideration and decision

under the provisions of Section 3 (a) of the Act of February 13th, 1925.

XIII. Wherefore, the premises considered, plaintiff prays the award and judgment of this Honorable Court that he is entitled to have and recover of the United States the sum of Twelve Hundred and Fifty Dollars ($1,250), as above demanded, and that he may be given such other and further [fol. 15] relief as the nature of his case may require or the Court may deem just.

William Hitz, Plaintiff. John W. Davis, George E. Hamilton, John S. Flannery, Attorneys for Plaintiff.

Duly sworn to by William Hitz. Jurat omitted in printing.

[fols. 16 & 17] CLERK'S CERTIFICATE

I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of William Hitz v. The United States, No. 42,233, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 24th day of February, A. D., 1933.

Willard L. Hart, Clerk Court of Claims of the United States.

(Seal Court of Claims.)

Endorsed on cover: File No. 37,427. Court of Claims. Term No. 730. William Hitz vs. The United States. Certificate. Filed February 24, 1933. File No. 37,427.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 729

DANIEL W. O'DONOGHUE,

vs.

THE UNITED STATES.

No. 730

WILLIAM HITZ,

vs.

THE UNITED STATES.

PLAINTIFFS' BRIEF.

JOHN W. DAVIS,
GEORGE E. HAMILTON,
JOHN S. FLANNERY,
DANIEL W. O'DONOGHUE, JR.,
Counsel for Plaintiffs.

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SUPREME COURT OF THE UNITED STATES.

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DANIEL W. O'DONOGHUE,

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PLAINTIFFS' BRIEF.

Short Statement.

The above cases are here on certificate from the Court of Claims. Suits were instituted in that Court by Daniel W. O'Donoghue, an Associate Justice of the Supreme Court of the District of Columbia, and by

William Hitz, an Associate Justice of the Court of Appeals of said District, to recover deductions of 10 per cent and 20 per cent, respectively, made from their official salaries for the months of July to December, inclusive, 1932, pursuant to a ruling of the Comptroller General of the United States based upon the Act of Congress approved June 30, 1932, making appropriation for the Legislative Branch of the Government for the fiscal year ending June 30, 1933 (47 Stat. 382, 399), in which was incorporated certain provisions known as the Economy Act.

Each of the plaintiffs was appointed and commissioned to hold his office during good behavior and at the time of his appointment, under the provisions of an Act of Congress approved December 13, 1926, "to fix the salary of certain Judges of the United States" (44 Stat. 919-920) the salary of an Associate Justice of the Supreme Court of the District of Columbia was permanently fixed at the rate of $10,000 per annum and that of an Associate Justice of the Court of Appeals of said District at $12,500 per annum.

By the Act "making appropriations for the Government of the District of Columbia and other activities chargeable in whole or in part against the revenues of such District for the fiscal year ending June 30, 1933, and for other purposes," approved June 29, 1932 (47 Stat. 343, 368), appropriation was made by the Congress to pay the full compensation of the plaintiffs and their Associate Justices.

These salaries are payable out of the Treasury of the United States and 60 per cent thereof is charged

against the revenues of the District of Columbia (Code D. C., 1929, Section 35, title 18).

From the date of their respective appointments and qualifications, each of the plaintiffs was paid the salary of his office to and including June 30, 1932. On or about July 13, 1932, the Comptroller General of the United States made a ruling in which he held, among other things, that the aforesaid Courts were "legislative" and not "constitutional" Courts entitled to the protection of Section 1, Article III, of the Constitution, and that the compensation of Justices thereof could be diminished.

Although willing to make a voluntary contribution, in the existing emergency, of as much of their time, money and services as they could afford, plaintiffs could not admit the power of Congress, under the Constitution, to compel or exact an enforced assessment of any amount whatsoever by diminishing the compensation to which they were entitled during their continuance in office, and in their petitions stated that while reluctant to institute a suit which might result in personal benefit to themselves, they felt it a duty to the Court, to the Bar, to the citizens of the District of Columbia and to the people of the United States to have the status of the Courts of the District of Columbia, as important, national and local tribunals, defined and settled.

Questions Certified.

The Court of Claims requests that it be given appropriate instructions for its guidance upon the fol-

lowing questions in both cases, which we have combined for convenience:

I. Does Section 1, Article III, of the Constitution of the United States apply to the Court of Appeals and Supreme Court of the District of Columbia and forbid a reduction of the compensation of the Justices thereof during their continuance in office?

II. Can the compensation of a Justice of the Court of Appeals or of the Supreme Court of the District of Columbia be lawfully diminished during his continuance in office?

Constitutional Provisions.

The following provisions of the Constitution are involved:

> Article I, Section 8. "The Congress shall have power * * *
>
> To constitute tribunals inferior to the Supreme Court;
>
> To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States."
>
> Article III, Section 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The Statute.

The statute relied upon by the Comptroller General is the Act of Congress making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933, approved June 30, 1932, Part II, Sections 105-107. The applicable provisions are the following:

> "Sec. 105. During the fiscal year ending June 30, 1933—
>
> "(*d*) In the case of the following persons the rate of compensation is reduced as follows: If more than $1,000 per annum but less than $10,000 per annum, 8⅓ per centum; if $10,000 per annum or more, but less than $12,000 per annum, 10 per centum; if $12,000 per annum or more, but less than $15,000 per annum, 12 per centum; if $15,000 per annum or more, but less than $20,000 per annum, 15 per centum; if $20,000 per annum or more, 20 per centum."
>
> *"Retired Pay"*
>
> "Sec. 106. During the fiscal year ending June 30, 1933, the retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office) and the retired pay of all commissioned and other personnel (except enlisted) of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, Lighthouse Service, and the Public Health Service shall be reduced as follows: If more than $1,000 per annum but less than $10,000 per annum, 8⅓ per centum; if $10,000 per annum or more, but less than $12,000, 10 per centum; if $12,000 per an-

num or more, but less than $15,000 per annum, 12 per centum; if $15,000 per annum or more, but less than $20,000, 15 per centum; if $20,000 per annum or more, 20 per centum. This section shall not operate so as to reduce any rate of retired pay to less than $1,000 per annum."

"Special Salary Reductions"

"Sec. 107. (*a*) During the fiscal year ending June 30, 1933—

"(5) the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

Jurisdiction of the Court of Claims.

This question, raised by the demurrer filed by counsel for the Government, is not a part of the certificate. The jurisdiction of the Court below is challenged upon the ground that these are claims against the District of Columbia and not against the United States. Plaintiffs below had no contractual relations with the District of Columbia and no claim upon that Municipal corporation for compensation. They were appointed, commissioned, qualified and are serving as Justices of Courts of the United States. By the Act of December 13, 1926, *supra*, their salaries were fixed as "Judges of the United States". Under the statutes creating the courts of the District of Columbia and the decisions of this Court defining their status, the courts over which they preside always have been regarded as

United States courts. Funds appropriated to pay the salaries of said justices are now in the Treasury of the United States, can be drawn therefrom only by checks of the disbursing officer of the Department of Justice and any unexpended balance of the appropriation, the Economy Act provides, must "be impounded and returned to the Treasury" (Act of June 30, 1932, *supra*). The obligation to pay these judicial salaries is the obligation of the United States (*James* v. *United States*, 202 U. S. 401). The Congress may discharge this obligation by including the necessary amount in the District of Columbia Appropriation Bill (Act of June 29, 1932, *supra*) or any other appropriation bill, and apportion or divide the amount appropriated between the United States and the District of Columbia as it sees fit. The method adopted for the discharge of a debt does not determine the incidence of the obligation.

Furthermore, the petition clearly sets forth a claim founded upon the Constitution of the United States and laws of Congress of which the Court of Claims is expressly given jurisdiction by Section 145 of the Judicial Code (U. S. C. Sec. 250).

LEGISLATIVE HISTORY OF THE DISTRICT OF COLUMBIA COURTS.

The Supreme Court.

This Court was created by the Act of March 3, 1863 (12 Stat. 762), and by the third section of that act, the court and the judges thereof were given the same powers and jurisdiction possessed and exercised by the old Circuit Court of the District of Columbia.

The Circuit Court was established by the Act of February 27, 1801 (2 Stat. 103), and consisted of a chief justice and two assistant judges appointed to hold office during good behavior and was vested with all of the powers given to the circuit courts of the United States and the judges thereof.

When this Act of February 27, 1801, was passed the law then in force which vested the judicial power in the circuit courts of the United States was the Act of February 13, 1801 (2 Stat. 89), the eleventh section of which made the following grant of jurisdiction:

> "*And be it further enacted,* That the said circuit courts, respectively, shall have the cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas; and, also, of all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made under their authority; and, also, of all actions or suits of a civil nature, at common law, or in equity, where the United States shall be plaintiffs or complainants; and, also, of all seizures on land or water, and all penalties and forfeitures, made, arising, or accruing, under the laws of the United States; which cognizance of all penalties and forfeitures shall be exclusively of the state courts, in the said circuit courts, where the offence by which the penalty or forfeiture is incurred, shall have been committed within fifty miles of the place of holding the said courts; and, also, of all actions or suits, matters or things, cognizable by the jurdicial authority of

the United States, under and by virtue of the constitution thereof, where the matter in dispute shall amount to four hundred dollars, and where original jurisdiction is not given by the constitution of the United States to the Supreme Court thereof, or exclusive jurisdiction, by law, to the district courts of the United States: *Provided, always,* That, in all cases where the title, or bounds of land shall come into question, the jurisdiction of the said circuit courts shall not be restrained by reason of the value of the land in dispute."

The Act of February 13, 1801, creating the circuit courts of the United States incorporated a new judicial district for the Territory of Columbia formed by cession from the States of Maryland and Virginia and contiguous counties of Virginia and Maryland surrounding that territory, Section 21 provides:

"And a new district shall be established in the districts of Maryland and Virginia, to consist of the Territory of Columbia, of all that part of the district of Maryland which lies west and south-west of the river Patuxent and of the western branch thereof, and south of the line which divides the county of Montgomery, in the last-mentioned district, from the county of Frederick; and of a line to be drawn from the termination of the last-mentioned line, a north-east course, to the western branch of the Patuxent; and of all that part of the district of Virginia, which lies north of the river Rappahannock, and east of the line which divides the counties of Fauquier and Loudon, in the last-mentioned district, from the counties of Fair-

> fax, Prince William, and Stafford; which new district shall be called the District of Potomac, and a district court in and for the same shall be holden at Alexandria, by the district judge of the district of Maryland, on the first Tuesday in April and the first Tuesday in October, in each and every year."

The Act of Congress of April 2, 1816, provided for the removal of causes "from the Circuit Court of the United States for the District of Columbia to the Supreme Court of the United States by appeal or writ of error," etc.

From the time of their organization, the Supreme Court of the District of Columbia and its predecessor, the old Circuit Court, have been designated in various Acts of Congress as "Courts of the United States" and the judges thereof have always been appointed by the President with the consent of the Senate for good behavior and have always been regarded as and had the same powers as the other Federal judges.

By Act of March 3, 1839 (5 Stat. 354), the chief justice of the District Court of the United States for the District of Columbia was given the right to review the decisions of the Commissioner of Patents.

By the Act of August 19, 1841 (5 Stat. 440), the Circuit Court was given jurisdiction in bankruptcy cases. By the Act of March 3, 1845 (5 Stat. 732), the Circuit Court was given jurisdiction over offenses against the franking privilege.

The Act of March 3, 1863 (12 Stat. 762), created the Supreme Court of the District of Columbia, with

one chief justice and three associate justices appointed by the President by and with the consent of the Senate to hold office during good behavior, with the jurisdiction formerly possessed by the Circuit Court, and requiring one justice of the new court to hold the District Court of the United States.

The Supreme Court was reorganized upon the passage of the Code of Law for the District of Columbia March 3, 1901, and the following sections expressly define the jurisdiction and powers of the justices as follows:

> "Sec. 61. *Jurisdiction.*—The said court shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia *under the Act of Congress approved March third, eighteen hundred and sixty-three, creating that court, and* at the date of the passage of this code."
>
> "Sec. 62. *Powers of Justices.*—The justices of said court, in addition to the powers and jurisdiction possessed and exercised by them as such, *under said Act of March third, eighteen hundred and sixty-three, and at the date of the adoption of this code,* shall severally possess the powers and exercise the jurisdiction possessed and exercised by the judges of the circuit and district courts of the United States."
>
> * * * * * * *
>
> "Sec. 64. The special terms of said court shall be known, respectively, as the circuit court, the

equity court, the criminal court, the probate court, and the district court of the United States."

* * * * * * *

"Sec. 84. *The District Court.*—The said district court shall have and exercise the same powers and jurisdiction as the *other district courts* of the United States, and such further special jurisdiction as may from time to time be conferred by Congress, and of all proceedings instituted in exercise of the right of eminent domain."

The recent amendment to the War Minerals Relief Act, approved February 13, 1929 (45 Stat. 1166, Sec. 3), provides:

"Jurisdiction is hereby conferred upon the Supreme Court of the District of Columbia, *as a district court of the United States,* to hear and determine all such suits and enter all orders, judgments and decrees therein, * * *" (i. e., suits to review the final decision of the Secretary of the Interior upon questions of law).

And in *Swift & Co.* v. *United States* (276 U. S. 311), Justice Brandeis said:

"Suits in equity under Revised Statutes, Sec. 4921, to enjoin patent enfringements, like suits in equity under the Anti-Trust Acts, are entertained by the Supreme Court of the District *solely by virtue of its general powers as a district court of the United States.*"

By Act of Congress approved June 19, 1930 (46 Stat. 785), the number of justices was increased and

the court is now composed of a chief justice and eight associate justices, all appointed for good behavior and receiving the same compensation as Federal District judges.

Court of Appeals.

The Court of Appeals of the District of Columbia was established by the Act of February 9, 1893 (27 Stat. 434), and upon the adoption of the D. C. Code in 1901, it provided:

> Sec. 221. *Constitution.*—The Court of Appeals of said district shall continue as at present organized, and shall consist of one chief justice and two associate justices, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold office during good behavior."

From time to time Congress greatly increased the jurisdiction of the court by special statutes relating to national matters, among which are the following:

Act of July 28, 1916 (39 Stat. 424; U. S. Code 1271, Par. 576), allowing appeals from Post Office Department in certain cases.

Amendment to Judicial Code February 13, 1925 (43 Stat. 936), regulating right of appellate courts to enforce, set aside or modify orders of Federal Trade Commission, Federal Reserve Board, Interstate Commerce Commission, etc., and also giving such courts jurisdiction in bankruptcy cases.

Act of February 26, 1926 (44 Stat. 109), authorizing appeals from Board of Tax Appeals.

Act of February 23, 1927, authorizing appeals from Radio Commission.

By Act of Congress approved June 19, 1930 (46 Stat. 785), the number of justices was increased to five and the court is now composed of a chief justice and four associate justices, all appointed for good behavior, receiving the same compensation as justices of the Federal circuit courts of appeal.

ARGUMENT.

I.

The Courts of the District of Columbia Are Constitutional Courts.

In *Downes* v. *Bidwell* (182 U. S. 244, 261), this Court said:

> "This District (District of Columbia) has been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and State Governments to a formal separation. The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the *ægis* of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void; in other words, Congress could not do indirectly by carv-

> ing out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States, ceased to be such by being ceded directly to the Federal Government."

When the District of Columbia was established by the Act of July 16, 1790, the seat of the National Government removed thereto and the circuit courts for the District of Columbia created by Congress, they became vested with all of the judicial power under Article III, and as held in *Kendall* v. *United States* (12 Pet. 524), they were given not only the same powers exercisable by other circuit courts of the United States but also certain additional and further powers under the Constitution which the latter courts did not possess.

Aside from the provisions of the District of Columbia Code, *supra*, it has been held repeatedly that the Supreme Court of the District of Columbia is a Court of the United States.

Embry v. *Palmer*, 107 U. S. 3;
Callan v. *Wilson*, 127 U. S. 540;
Benson v. *Henkle*, 198 U. S. 1;
James v. *United States*, 202 U. S. 407-8;
Cross v. *U. S.*, 145 U. S. 571, 576 (Fuller, C. J.);
Moss v. *U. S.*, 23 App. D. C. 475, 481, 482 (Alvey, C. J.).

Whether the courts of the District of Columbia were established under the power given Congress by Arti-

cle I, Section 8, "to constitute tribunals inferior to the Supreme Court" or "to exercise exclusive legislation in all cases whatsoever over such District, etc.," or under Article III, Section 1—"the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish"—it cannot be denied that they are tribunals inferior to the Supreme Court of the United States and repositories of the judicial power under Article III of the Constitution. They are a part of the Federal Judicial System, as this Court said in *Federal Trade Commission* v. *Klessner* (274 U. S. at p. 145).

The Supreme Court and Court of Appeals of the District of Columbia possess (1) the jurisdiction appertaining to all of the other Federal Courts of the United States which grows out of the exercise of the judicial power granted in Article III of the Constitution; (2) an extensive jurisdiction involving matters of substantive law, controversies arising and crimes committed in the District of Columbia similar to that exercised by the Courts of the several States, and also special administrative supervision over certain bodies like the Utility Commission which cannot be conferred upon the other Federal Courts of the United States and finds its source in Article I, Section 8, of the Constitution, and (3) the novel and peculiar jurisdiction which has been conferred upon them from time to time over controversies which are national in character, origin and scope and which have no relation to or connection with the District of Columbia other than

the fact that the executive and legislative branches of the Government are located in and perform their important functions at the Capital of the Nation.

This latter very important jurisdiction peculiar to the courts of this district and not possessed by any other Federal courts of the United States and, of course, by no State tribunal, originates in other powers delegated to the United States by the several States, such as the power to regulate commerce, grant patents and copyrights, establish post offices and post roads, protect the customs and revenue, to borrow and coin money, to lay and collect taxes, establish uniform naturalization and bankruptcy laws, punish felonies committed on the high seas and offenses against the law of nations, to declare war and support the Army and Navy, etc. This very important national jurisdiction might be conferred by Congress upon or divided with the other Federal courts, over which Congress has no legislative power, instead of being localized in the District of Columbia for the convenience of the National Government. By the Act of February 13, 1925, *supra,* some of the appellate jurisdiction in these national matters was given to the Circuit Courts of Appeal.

None of this extraordinary national jurisdiction has any relation to the District of Columbia as a municipality. All relates to the National Government and may be exercisable anywhere in the United States. The test is the character of the jurisdiction granted—not the locality of its exercise.

An examination of any volume of the decisions of the Court of Appeals will show the national character of this unusual jurisdiction—

Suits to prevent deportation of aliens;
Questions arising under the provisions of the Transportation Act;
Mandamus proceedings growing out of Indian treaties;
Equity proceedings involving patents to public lands;
Suits to prevent the enforcement of the postal laws and regulations;
Suits to compel the Federal Power Commission to vacate licenses for lands in California;
Actions affecting the Civil Service Commission;
Suits against the Alien Property Custodian to recover the property of a Philippine partnership;
Injunctions against the Federal Trade Commission;
Suits to determine title to patented school lands in California;
Appeals from the Board of Tax Appeals involving deficiency assessments for income taxes throughout the United States;
Mandamus proceedings under the War Veterans Act;
Injunction proceedings to prevent the cancellation of rights of way in connection with irrigation projects in Western States;
Suits involving the sale of the vessel of an enemy corporation;
Injunction proceedings to restrain cancellation of oil leases in Oklahoma, and oil and gas permits in California;
Actions against the Secretary of State to compel the admission of aliens and against the Secre-

tary of the Interior to compel the enrollment of Indians;
Appeals under the Radio Commission Act;
Suits under the Federal Anti-Trust Law, etc.

This blending of jurisdiction, local or municipal, with Federal or National, under the delegated powers conferred upon Congress has resulted in the courts of the District of Columbia receiving a jurisdiction which is unique, broader, and more difficult to administer than that possessed by any courts, Federal or State, in the whole United States.

The granting to the courts of the District of Columbia of an extensive jurisdiction in purely national matters establishes their status as courts of the United States and their exercise of the judicial power under Article III of the Constitution.

There is a vast distinction between jurisdiction and judicial power. The former may be granted, qualified or taken away at the will of Congress. Congress has frequently increased and diminished the appellate jurisdiction of this Court and created and abolished inferior courts. But after having created an inferior court of the United States and defined the subjects over which it would have jurisdiction, Congress cannot limit the exercise of the judicial power because that comes directly from the Constitution and is not derived from Congress.

As Mr. Justice Story points out in *Martin* v. *Hunter's Lessee*, 1 Wheat. 305, 328, Congress in creating these inferior courts and vesting them with judicial power was performing an imperative duty. He says:

"The language of the article is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall* be vested (not *may* be vested) in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction? * * * If, then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress is bound to act in preference to others.

* * * * * * *

"It would seem, therefore, to follow that Congress is bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court can not take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time at their own pleasure. But the whole judicial power of the United States

> should be, at all times, vested either in an original or appellate form, in some courts created under its authority."

Chief Justice Hughes, in his "The Supreme Court of the United States" (p. 133), quotes the following passage from the decision of Mr. Justice Brewer in *Kansas* v. *Colorado* (206 U. S. 46), on the subject of the judicial power:

> "The judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals."

Nor can the fact that Congress has assigned to the courts of the District of Columbia certain administrative functions which cannot be given to the other Federal courts of the United States change their character from judicial to legislative tribunals.

In *Postum Cereal Company* v. *California Fig Nut Company* (272 U. S. 693, 700), it is said that while Congress "may vest courts of the District with administrative or legislative functions which are not properly judicial, it may not do so with this [the Supreme] Court or any Federal court established under Article III of the Constitution."

Doubtless what it was sought to demonstrate was that Congress could not impose administrative or legislative functions on this Court or upon those Federal courts established *exclusively* under said Article III.

Again in *United States* v. *Duell* (172 U. S. 576, 582-3), it is shown that Congress has exercised its constitutional power to promote the progress of science and useful arts by providing such instrumentalities as will be best calculated to effect this object and since 1790 has varied these instrumentalities from time to time and "since 1870 has asserted the power to avail istelf of the courts of the District of Columbia in that connection." It cannot be contended that this power has any relation to the government of the District of Columbia or was granted to our local courts under the power of exclusive legislation for said District.

This leads to a discussion of the cases in which the status of the District of Columbia courts has been passed upon.

James v. *United States* (38 Ct. Cls. 615; 202 U. S. 401).

The only case in which it was directly decided that the courts of the District of Columbia are inferior courts of the United States under Article III of the Constitution was *James* v. *United States* (38 Ct. Cls. 615; 202 U. S. 401). In this case, the Court of Claims, in an exhaustive opinion by Judge Howry, traced the history of the Supreme Court of the District of Columbia to its constitutional source. The question there involved was a claim for retired pay by the widow of Justice James of the Supreme Court of the District of Columbia and upon appeal this court held that the case was covered by the statute and it was unnecessary to decide the question whether the court itself was an inferior court under Section 1, Article III. The opinion

of Judge Howry cites the cases in this court which differentiate the temporary territorial courts created under Section 3, Article IV, from the permanent tribunals established for the District of Columbia under Section 1, Article III, and says:

> "The legislation of Congress from the beginning of the Government to the present time is largely in keeping with the view that Congress have legislated upon the theory that the courts of the District of Columbia are permanent tribunals capable of receiving some part of the judicial power which can be conferred on courts in the District of Columbia as well as on courts of the United States in the States.
>
> "The judiciary act of 1789 included the area which later formed the District of Columbia (1 Stat., L. 73).
>
> "When by the act of February 13, 1801 (2 Stat., L. 89), Congress passed an act to provide for the more convenient organization of the courts of the United States, the District of Columbia was included within a Federal district created by the act. By the act of February 27, 1801 (2 Stat. 1, 103), entitled 'An act concerning the District of Columbia,' the laws then in force in the State of Virginia and in the State of Maryland were continued in force in that part of the District which had been ceded by those States. A separate circuit court for the District was made, in effect with all the powers of circuit courts and with judges of the same kind of tenure as provided for the court of the circuit from which the District was omitted. The District of Columbia was thus to all intents and purposes segregated as a single circuit from

> the other circuits and stood alone as a circuit court *sui generis*. It possessed most of the powers belonging to circuit and district courts of the United States and nearly all the jurisdiction that belonged to either of them, and also had some powers which belonged to neither of those courts."

Ex Parte Bakelite Corporation (279 U. S. 438).

The Comptroller General relied upon the decision in the *Bakelite* case to support his ruling that the courts of the District of Columbia are legislative and not constitutional courts and that the justices thereof are, therefore, subject to a reduction in pay under the Economy Act. The language he relies upon will be found at the top of page 449:

> "While Article III of the Constitution declares, in Section 1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish,' and prescribes, in Section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in Section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power

defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of Section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

"The first pronouncement on the subject by this Court was in *American Insurance Co.* v. *Canter*, 1 Pet. 511, where the status and jurisdiction of courts created by Congress for the Territory of Florida were drawn in question. Chief Justice Marshall, speaking for the court, said, p. 546:

" 'These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.'

"That ruling has been accepted and applied from that time to the present in cases relating to territorial courts.

> "A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that Article."

The only question before the court in the *Bakelite* case was the status of the Court of Customs Appeal, and while reference is made to the territorial courts and the courts of the District of Columbia by way of analogy, the opinion itself does not assert that the courts of the District of Columbia were established *exclusively* under the legislative power of Congress over the District of Columbia, but simply indicates that in so far as they were established under that power they were legislative courts and clothed with authority and charged with the duty of giving decisions in proceedings which are not cases or controversies within the meaning of Article III but are merely in aid of legislative or executive action and, therefore, outside the admissible jurisdiction of courts established under Article III.

There is certainly no prohibition in the Constitution against the creation of courts with legislative and ad-

ministrative duties or with both legislative and constitutional duties, and if the Constitution had included a different article or section under Article III in which it had said "Congress may confer on Federal courts administrative and legislative jurisdiction where necessary to carry out the powers granted," of course, it would not be argued that this jurisdiction could not be conferred on the Federal courts generally. There being no prohibition in the Constitution, Congress has the right to give to the District of Columbia courts the judicial power under Article III and to give them the administrative functions under Article I; in other words, Congress could exercise its dual powers of a national legislature and of a State legislature in granting jurisdiction to our local court.

McAllister v. *United States* (141 U. S. 174).

This case is frequently referred to as placing the courts of the District of Columbia upon a parity with the territorial courts. As Mr. Justice Harlan plainly shows in his opinion, the court was there considering the status of temporary tribunals which would be superseded when the territories became States of the Union (Op. 188). His opinion gave rise to a strong dissent by Mr. Justice Field which was concurred in by Mr. Justice Gray and Mr. Justice Brown (hereinafter quoted).

In *Cross* v. *United States* (145 U. S. 571), decided shortly after the *McAllister* case, Chief Justice Fuller distinguished these temporary tribunals from the per-

manent courts of the District of Columbia in the following language:

> "It is contended on behalf of the government that the writ of error will not lie because the Supreme Court of the District of Columbia is not a court of the United States, within the intent and meaning of the section (Sec. 6 of the Act of Feb. 6, 1889, 25 Stat. 655). *McAllister* v. *United States*, 141 U. S. 174, is cited with the decisions referred to therein, as sustaining that view; but it is to be remembered that that case referred to territorial courts only; * * *" (p. 576).

Pitts v. Peak (50 F. (2d) 485)

In the opinion of the Court of Appeals in *Pitts* v. *Peak*, Mr. Justice Groner traces the jurisdiction of the courts of this district to both the power of exclusive legislation under Section 8, Article I, and to the judicial power under Article III of the constitution. He says (p. 486):

> "The Supreme Court of the District is a court of the United States (Section 43, title 18, D. C. Code 1929), for the administration of the laws of the United States. It is made such by enactment of Congress, and derives its jurisdiction and powers from the same source as, and in this respect is like, all other inferior law courts of the United States, for only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. *Kline* v. *Burke Const. Co.*, 260 U. S. 226 at page

234, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. But Congress in turn derives its powers from the Constitution. It is therefore, we think, not precisely accurate to speak of the Supreme Court of the District as a legislative court, except in like manner as all other inferior courts of the United States are legislative courts, or to liken it to consular courts, or to that class of courts or tribunals created by Congress to perform some function primarily belonging to the Congress but which it may rightfully exercise or delegate, or to territorial courts, of which Chief Justice Marshall said, in *American Ins. Co.* v. *Canter,* 1 Pet. 511, 546, 7 L. Ed. 242, they 'are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it,' for this is not true of the Supreme Court of the District of Columbia because, as was said by the Supreme Court, speaking of that court, 'We find here a court which by acts of Congress is to be treated as a district court of the United States.' *Federal Trade Commission* v. *Klesner,* 274 U. S. 145, 158, 47 S. Ct. 557, 560, 71 L. Ed. 972, and which, by act of Congress, has had conferred upon it all the power and jurisdiction conferred by Congress upon the district courts under article 3 of the Constitution. That Congress has also conferred upon the Supreme Court of the District, jurisdiction in or powers beyond those designated cases and controversies prescribed by Section 2 of article 3 does not, we think, change the nature or constitution of that court, but grows, rather, out of another constitutional provision found in Section 8 of article 1 granting to Congress power to exercise ex-

clusive legislation in all cases whatsoever over the District of Columbia, which, as the Supreme Court said in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 442, 43 S. Ct. 445, 67 L. Ed. 731, means 'that as to the District, Congress possesses, not only the power which belongs to it in respect of territory within a state, but the power of the state as well. In other words, it possesses a dual authority over the District, and may clothe the courts of the District, not only with the jurisdiction and powers of Federal courts in the several states, but with such authority as a state may confer on her courts,' and this latter authority, that is to say, the sovereign power of the state, as was held in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150, may permit legislative and judicial powers to be united in a single hand. But it by no means follows that because Congress has seen fit, by virtue of its authority over the District of Columbia, to confer upon the courts of the District administrative functions, which outside the District it may not confer upon courts created solely under article 3, these courts are any the less created under that article of the Constitution, nor do we know of anything in the history of these courts or in the legislation with relation to them which would indicate the contrary. We think a reasonable and correct view of the subject would indicate that, in the creation and organization of the superior courts of the District of Columbia, Congress has availed of its dual constitutional right in the first place to establish courts of law and invest them, as it has, with power and jurisdiction over all cases and controversies which, under the au-

thority of article 3, it has invested the district courts of the United States, and, in the second place, in the exercise of the power of a sovereign state, under the provisions of section 8 of article 1, has further imposed upon them jurisdiction and power which it cannot impose upon other like courts functioning outside the District. There is no inhibition in the Constitution against the exercise by Congress of this dual power, arising as it does out of an express grant in the one case (article 3) and an implied grant in the other (article 1, sec. 8), nor does its exercise in the one case exhaust its power and prevent its exercise in the other, and therefore we assume, when Congress created the two courts—the district courts of the United States and the Supreme Court of the District of Columbia—and gave to each, within its own sphere, identical jurisdiction, that it drew its power from the same source, even though it was necessary it should have recourse to another provision of the Constitution in order to clothe the courts at the seat of government with other and additional authority not permissible under article 3."

The statement in *Pitts* v. *Peak, supra,* that the Supreme Court of the District of Columbia is not a legislative court except in the sense that it is also a constitutional court, is sustained by reference to that provision of the Constitution in relation to the power of Congress over the District of Columbia, for it is there provided (Article I, Section 8) that Congress shall have the same power over the District of Columbia as it has over forts, dockyards, and other places

purchased by consent of the legislature of the State in which the same shall be. The judicial power thus granted over places acquired by Congress as forts and dockyards is the judicial power under Article III plus the judicial power of the State in which the property is located, and this latter jurisdiction arises out of the cession by the particular State. The United States, therefore, possesses as to such places *a dual power*, and it was this dual power that Chief Justice Taft spoke of in *Keller* v. *Potomac Electric Co.* (261 U. S. at page 443), where, in speaking of the power of Congress over the District of Columbia, he said: "In other words it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of Federal courts in the several States but with such authority as a State may confer on her courts." But this is not the same power which Congress possesses over the territories, which, unless otherwise provided by treaty, is unrestricted. Congress may therefore clothe the courts of the territories with "like powers" as constitutional courts but without regard to the particular constitutional source from whence these powers arise. And this it has done from time to time. But in the case of the District of Columbia the Constitution attached when it was a part of the State of Maryland, and, as is said in *Downes* v. *Bidwell, supra,* "the mere cession of the District of Columbia to the Federal government relinquished the authority of the States but it did not take it out of the United States or from under the aegis of the Constitution." And hence the constitutional

provision in Article III that the judges of the courts of the United States should be appointed for good behavior and should not be subject to reduction of salary is a safeguard which the inhabitants of all the States of the Union as well as those of the District of Columbia have a right to demand to insure the proper and consistent interpretation and administration of the national laws.

Claiborne-Annapolis Ferry Company v. *The United States* (285 U. S. 382)

The decision in *Pitts* v. *Peak* was cited with approval in the opinion of Mr. Justice McReynolds in the Claiborne-Annapolis Ferry Company case, where he held:

> "It has been suggested that the Supreme Court of the District of Columbia cannot be regarded as a district court, and judges of the Court of Appeals of the District are not circuit judges within those provisions; consequently the District Supreme Court had no jurisdiction to hear the present cause. The point is without merit.
>
> "Section 43, title 18, District of Columbia Code, 1929, provides that the Supreme Court 'shall possess the same powers and exercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States.' *Federal Trade Commission* v. *Klesner*, 274 U. S. 145, 156, 47 S. Ct. 557, 560, 71 L. Ed. 972, held that Section 5 of the Federal Trade Commission Act, conferring jurisdiction on the circuit courts of appeals to enforce, set aside, or modify orders of the commission, should be construed as conferring like

> jurisdiction upon the Court of Appeals of the District of Columbia. 'The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the states would be regarded as within Federal jurisdiction, is complete.' And see *Pitts* v. *Peak* (App. D. C.) 50 F. (2d) 485."

The Harvard Law Review for February, 1933, p. 677, contains an instructive article on "The Court of Claims: Judicial Power and Congressional Review," fully reviewing the Bakelite and other decisions in this Court and the status of the courts of the District of Columbia as well as that of the Court of Claims.

II

The Compensation of the Justices of the Supreme Court and Court of Appeals of the District of Columbia Cannot Be Lawfully Diminished.

If the courts of the District of Columbia are inferior courts of the United States exercising the judicial power conferred by Article III of the Constitution, they are entitled to the protection of Section 1 of that Article which guarantees permanency of tenure and stability of compensation.

There is no limitation in this constitutional provision that this guarantee shall be restricted to such inferior courts as may be established wholly for the purpose of exercising judicial power and no decision of this or any other court has been found which holds that in-

ferior courts of the United States exercising legislative and administrative functions as well as judicial powers are not entitled to this constitutional protection. To so hold, would give the Constitution a construction not contemplated by the fathers.

Alexander Hamilton, in the Federalist, No. LXXVIII, clearly pointed out the intentions of the fathers of the Constitution, and in No. LXXIX, said:

> "Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitution on this head. Some of these indeed have declared, that permanent salaries should be established for the judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States 'shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office.' "

As stated in the dissenting opinion of Mr. Justice Field in the *McAllister* case (141 U. S. at p. 196), and recited in the Declaration of Independence, among the repeated injuries and usurpations of the King of Great Britain, which our fathers declared just ground for separation from the mother country, was that he had "made judges dependent upon his will alone for the tenure of their office and the amount and payment of their salaries," and when the Constitution of the United States was framed, the convention took special care to prevent the possibility of the commission of such a wrong, under the new government to be created, by embodying in that instrument the declaration that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Art. III, Sec. 1. "This provision," said Mr. Justice Field, "was only the expression of a principle that had become the established law of all English-speaking people. When the Constitution was under discussion before the country previous to its adoption this article received special attention."

And Chancellor Kent, in his Commentaries, Vol. 1, pages 292-295, after tracing this provision of our Constitution to its English source, says:

> "The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends also to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are

> enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions. By the English act of settlement of 12 and 13 William III, it was declared that the salaries of the judges should be ascertained and established; but by the statute of 1 Geo. III, the salaries of the judges were absolutely secured to them during the continuance of their commissions. The constitution of Massachusetts followed the declaration in the English statute of William, and provided that permanent and honourable salaries should be established by law for the judges; but this was not sufficiently precise and definite to guard against all evasion; and the more certain provision in the Constitution of the United States has been wisely followed, in the subsequent constitutions of most of the individual States."

Marshall's oft quoted words are:

> "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a *dependent judiciary*" (Debates Va. Conv., 1829-1831, pp. 616, 619).

and Justice Story said:

> "Without this provision (as to an undiminishable compensation), the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery."

Another great authority declared:

> "No one can doubt the perfect authority of Congress to remodel their Courts, or to confer or withdraw their jurisdiction at their pleasure. But the question is, whether they can deprive Judges of the tenure of their office and their salaries after they have once become constitutionally vested in them."
>
> 3 Tuck. Black. Comm., App. 22 to 25.

See also the learned discussion of the tenure and compensation of the Judiciary in *Story on the Constitution*, Vol. 2, Secs. 1607-1635.

In most of the plans proposed in the constitutional convention, there was a prohibition against increase as well as diminution of the compensation of the judiciary.

> Elliott's Debates (1st ed.), Vol. 1, pages 144-176-182.

But the prohibition against increase was rejected and Mr. Madison admitted:

> "I wished myself to insert a restraint on the augmentation as well as the diminution of their compensation and supported it in the convention; but I was overruled."
>
> Supra, Vol. III, p. 537.

In order to make more effective this constitutional provision for the protection of the Justices of this Court and of all courts of the United States inferior thereto, the Congress passed the Retirement Act, now Section 375 of the United States Code, providing for the compensation of all judges of courts of the United

States appointed to hold office during good behavior who might resign or retire after having served at least ten years continuously and after having attained the age of 70 years. Under this statute, the Justices of this Court must *resign*—other members of the Federal judiciary may resign or retire. The well known purpose of the Retirement Act was to eke out the meagerness of judicial compensation and to offer an inducement to distinguished lawyers to relinquish the greater emoluments of private practice by guaranteeing to them upon the completion of arduous service upon the bench the same compensation they were receiving upon resignation or retirement.

Attorney General Harmon on November 18, 1926 (21 Op. A. G. 449, 451), in passing upon the right of Judge Nott, of the Court of Claims, to avail himself of the provisions of this Retirement Act, said:

> "The object was to further the good of the public service by providing for the retirement at full pay of judges who have reached the age of 70 and been ten years on the bench. The expression 'any judge of any court of the United States' was certainly intended to have a wide application. * * * It is a matter of common knowledge that the object of this statute was not only to offer an additional inducement to enter the judicial service of the United States but also to encourage the retirement therefrom of men whom age or infirmity make incapable of further service, some of whom at the time of the passage of the Act had already been for a considerable time wholly disabled."

And Chief Justice Hughes, in his "Supreme Court of the United States," page 74, says:

> "While Congress could not provide constitutionally for the compulsory retirement of a judge during good behavior by fixing an age limit, Congress could and did provide (1869) for the voluntary retirement *on full pay* at or after the age of 70 years when a judge had held his commission for at least ten years."

The constitutional exemption from diminution of salary followed the office of all members of the Federal judiciary and became a fixed condition of the tenure, irrespective of the constitutional source in which the office originated.

If the Comptroller General's construction of the Economy Act be correct and the Congress thereby intended to reduce the salaries of the Federal judges who had *resigned* but did not intend to diminish the compensation of those who had *retired* because of the Constitutional inhibition, then a trap has been laid for the members of the Federal judiciary who resigned relying upon the promise contained in the statute and the good faith of Congress in enacting it. Congress could not have forced them to retire by fixing an age limit, but, according to the Comptroller General, it could tempt them to resign voluntarily and thereafter reduce the compensation of the resigned justices of this Court 50 per cent, of the various Federal courts of appeal 20 per cent and of the Federal courts of first instance 10 per cent.

As indicating that a broad question of public policy is involved in placing judicial office and compensation beyond the reach of the appointing or legislative power, the very recent case of *Bailey* v. *Waters*, Auditor General (162 Atl. Rep. 819), is instructive. There the Supreme Court of Pennsylvania reviewed the power of the legislature to decrease a judicial salary during the incumbent's continuance in office and held that it could not be done—although the constitution of Pennsylvania of 1790 (Article V, Section 2) which was modeled after the Federal Constitution (Article III, Section 1) provided that compensation of judges "shall not be diminished during their continuance in office" and these words were omitted from the Constitution of 1873. The Court there points out that a similar conclusion was reached in the Chancellor's Case, 1 Bland (Md.) 595, where the legislature of Maryland attempted to reduce the salary of the Chancellor but rescinded its action after considering the memorial presented by him to the legislature.

The argument of Chancellor Bland in the latter case is worthy of careful study. He said, among other things (1 Bland, 671):

> "Commissions during good behavior, and salaries secured during the continuance of those commissions, constitute that strong well marked boundary between the judiciary and the other two departments. Thus founded and sustained, the judges are, and can be—and without it they cannot be—a firm, efficient, co-ordinate check and balance in the Government. It is this independency of character, that enables the judiciary

to shield the citizen against unconstitutional legislation; and against unwarranted wrong and violence from the wealthy and the influential."

* * * * * * *

"This interference with the *duration* of judicial salaries has another obvious and direct tendency, no less hostile to the principles of our constitution. The *appointing power* is lodged, exclusively, with the governor and council. But, if the general assembly can, at pleasure, withhold or reduce a judicial salary, it is evident they may, in that manner, come into direct collision with the *appointing power* of the executive. If the person, appointed to a judicial office, happens to be displeasing to the legislature, his salary may be, at once, withdrawn or reduced so as to force him to resign. And what is most odious, in this kind of collision, is, that this unjustly excited and misguided feeling of the legislative body may be aroused by persons who are not members of it; by persons who are not of either house; but, who have influence and a knack at intrigue. Such malcontents may work upon the honest indolence of members, and urge them on, unthinkingly, to effect the ruin of the best of men, and the most sacred of institutions, merely to gratify some smuggled and vile malignancy, which they dare not have the impudence to exhibit openly before the public."

On many occasions Congress has increased the compensation of the justices of the District of Columbia and other courts of the United States but has never attempted to directly diminish their compensation, and every statute the effect of which might be to reduce the

salaries of Federal judges has been held to be unconstitutional.

In the leading case of *Evans* v. *Gore* (253 U. S. 245), (in which Mr. Justice Van Devanter, who delivered the opinion in the *Bakelite* case, announced the opinion of the court) a tax upon the net income of a United States District Judge assessed under the Act of February 24, 1919, by including his official salary, thus operating to diminish his compensation, was held unconstitutional. The opinion quotes at length from President Washington, Chief Justice Marshall and Alexander Hamilton to show that this immunity from diminution of compensation written into the Constitution

> "was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.
>
> * * * * * * *
>
> "The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly

> accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries" (Opinion, pp. 253-255).

In the later case of *Miles* v. *Graham* (268 U. S. 501), the same ruling was applied to a judge of the Court of Claims.

A similar conclusion was reached by Chief Justice Taney in protesting against the construction placed by the Treasury Department upon an Act of Congress in 1863 imposing a tax of three per cent on the salaries of all officers in the employment of the United States so as to embrace judicial officers and salaries of judges. In a letter to Secretary Chase, under date of February 16, 1863, and reported in 157 U. S., Appendix 701, the learned Chief Justice said:

> "I find that the act of Congress of the last session imposing a tax of three per cent on the salaries of all officers in the employment of the United States, has been construed in your department to embrace judicial officers, and the amount of the tax has been deducted from the salaries of the judges.
>
> The first section of the third article of the Constitution provides that 'The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may, from time to time, ordain and establish. The judges of both the Supreme and Inferior Courts shall hold their offices during good

behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.'

The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void; and I should not have troubled

> you with this letter, if there was any mode by which the question could be decided in a judicial proceeding."

It is in the same spirit as impelled this remonstrance by Chief Justice Taney that the judges of the Supreme Court and of the Court of Appeals have instituted this action. The monetary loss by reason of the diminution of their salaries is of little consequence compared with the surrender by them of the independence of the respective tribunals of which they are judges. They have never been unwilling to assume a fair share of their burden as citizens in a time of great national distress, but on the other hand they regard it as their duty not to acquiesce in a ruling which would forever displace the courts of which they are members from the independent position which those courts have occupied without question from the time of their establishment.

There is distinguished precedent for the remonstrance of Chief Justice Taney, for as far back as 1788, George Wythe, John Blair, and Edmund Pendleton, three of the great lawyers of that period and then members of the Supreme Court of Appeals of Virginia, united in a "respectful remonstrance" to the legislature of that State against a statute effecting a reduction of their compensation and imposing upon them as well duties in other courts. (*4 Call (Va.) 135.*) The Virginia constitution then provided as to the appointment of judges: "The two houses of assembly shall by joint ballot, appoint judges of the supreme court of appeals, and general court, judges in chancery, judges of admiralty, secretary, and the at-

torney general, to be commissioned by the governour, and continue in office during good behaviour." There was, however, not then a constitutional prohibition against diminution of salary. These great judges, after stating their regret that they were impelled to make the remonstrance "at a time when the minds of the citizens are agitated upon other questions of great and national concern," nevertheless declared that "finding themselves called by their country to sustain an important post as one of the three pillars on which the great fabric of government was erected," their duty required them to declare their opposition to the act. In the remonstrance they said, "No free government, or the blessing of liberty can be preserved to any people but (among other things) by frequent recurrence to fundamental principles;" and then they state this fundamental principle as follows: "The propriety and necessity of the independence of the judges is evident in reason and the nature of their office; since they are to decide between government and the people, as well as between contending citizens; and, if they be dependent on either, corrupt influence may be apprehended, sacrificing the innocent to popular prejudice; and subjecting the poor to oppression and persecution by the rich. And this applies more forcibly, to exclude a dependence on the legislature; a branch, of whom, in cases of impeachment, is itself a party." And again: "For vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper,

or by making it a part of the official duty to become hewers of wood, and drawers of water." The remonstrance resulted in a change of the statute of Virginia at the next session of the General Assembly.

Evans v. *Gore* and *Miles* v. *Graham*, *supra*, were decided upon the broad proposition that the purpose of Article III, Section 1, of the Constitution was to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and for the rich; that such purpose was not to be construed as a private grant but as a limitation imposed in the public interest; that the prohibition is general, contains no excepting words and appears to be directed against all diminution. No suggestion is to be found in these cases that this Court was making any narrow distinction between tribunals created under the judicial power, the legislative power, or both. The interpretation given to the Bakelite decision by the Comptroller General would have the effect of overruling *Evans* v. *Gore* and *Miles* v. *Graham*. The broad principles announced in these cases cannot be destroyed by the dictum in the *Bakelite* case and the subsequent decision of this Court in *Claiborne-Annapolis Ferry Company* v. *The United States* (285 U. S. 382, *supra*), may be taken as an indication that the Comptroller General is giving the *Bakelite* decision an interpretation that was never in the contemplation of the learned Justice who wrote it.

In *James* v. *United States* (202 U. S. at pp. 407-8), *supra*, Mr. Justice White said:

> "The words of the statute 'when any judge of any court of the United States resigns his office,' are broad enough to embrace all courts created by the United States, *without taking into view the particular constitutional authority which was exercised in such creation.* * * * We do not deem it necessary to determine whether the Supreme Court of the District of Columbia is an inferior court within the meaning of Sec. 1 of Article 3 of the Constitution, since, even if it be not a court of that character, it is nevertheless a court of the United States within the meaning of Rev. Stat. Sec. 714."

To hold that the compensation of the justices of the courts of the District of Columbia may be diminished, directly or indirectly, by the Economy Act or any similar statute would make these courts subservient to the will and caprice of Congress, would destroy the separation of powers made by the Constitution and make Congress supreme, because the body that controls the subsistence of layman or jurist can influence his actions and decisions.

No courts in the United States are closer to the administrative and legislative branches of the Government than the courts of this District and none are more susceptible to the influence which inevitably flows from personal contacts.

The courts of the District of Columbia are not only the guardians of the lives, liberties and property of the residents of the District of Columbia, but of all offi-

cers of the Government stationed here, while it is to these courts that the citizens of the Nation must resort for assertion of their rights against alleged disregard or invasion by officers and commissions of the general Government, as, in many cases, it is here alone that jurisdiction can be obtained. There are no courts in the land whose independence is more important to the American people than these courts, nor any which stand more in need of the constitutional protection against the possibility of encroachment by executive and legislative influence and authority. As they are wholly and peculiarly within the spirit and purpose of the constitutional provision, they must be within its protection. *Ratio legis, est anima legis.*

It is respectfully submitted that the first questions certified should be answered in the affirmative and the second in the negative.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 729

DANIEL W. O'DONOGHUE

vs.

THE UNITED STATES.

No. 730

WILLIAM HITZ

vs.

THE UNITED STATES.

PLAINTIFFS' MEMORANDUM.

JOHN W. DAVIS,
GEORGE E. HAMILTON,
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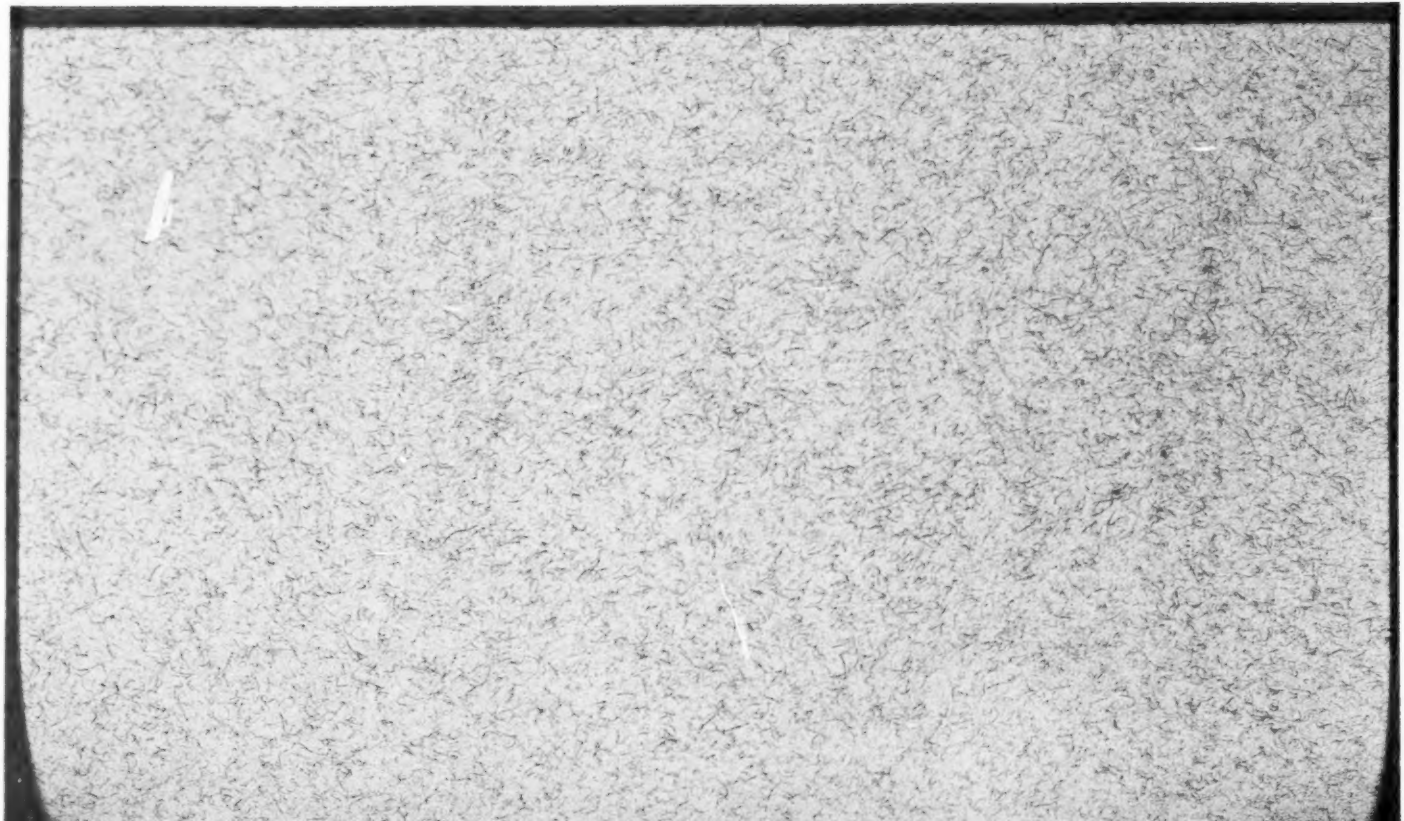
DANIEL W. O'DONOGHUE, JR.,
Counsel for Plaintiffs.



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PLAINTIFFS' MEMORANDUM ON THE EARLY LEGISLATIVE HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA.

By the act of March 3rd, 1863 (12 Stat. 762), creating the present Supreme Court of the District of Columbia, its powers and jurisdiction are defined in terms of the powers and the jurisdiction exercised by

its predecessor, the old circuit court of the District of Columbia. It is, therefore, the true lineal descendant of that court and by the character of its ancestor its character as a legislative or constitutional court may be judged.

Prior to the removal of the seat of the National Government to the banks of the Potomac the citizens of Maryland and Virginia residing within the area thereafter ceded to Congress possessed the same rights under the Constitution as their fellow citizens of the several States, including what might be described as the right to apply to a constitutional court in matters involving the judicial power of the United States, and to have their controversies of a Federal nature adjudicated by judges appointed for life and whose compensation could not be diminished during their term of office. They like all other citizens of the United States were entitled to have their constitutional rights determined by a tribunal whose independence was secured by no lesser guaranties.

This memorandum proposes to enumerate briefly the inferior courts successively provided by Congress for the exercise of the judicial power of the United States over the territory taken for the seat of the National Government. Keeping in mind the constitutional rights of the citizens residing in that territory to apply to some constitutional court or courts for the adjudication of their controversies involving the judicial power of the Federal Government, the legislative history of the courts of the District of Columbia may be stated as follows:

At the time of the passage of the Judiciary Act of 1789 the territory in question was still, of course, part of the States of Maryland and Virginia and the appropriate circuit and district courts created by that act for the districts of Maryland and Virginia had jurisdiction over the area soon to become the District of Columbia. This act provided in part:

> "SEC. 2. AND BE IT FURTHER ENACTED, That the United States shall be, and they hereby are divided into thirteen districts, to be limited and called as follows, to wit: * * * one to consist of the State of Maryland, and to be called the Maryland District; one to consist of the State of Virginia, except that part called the District of Kentucky, and to be called the Virginia District * * *"

> "SEC. 3. AND BE IT FURTHER ENACTED, That there be a court, called a District Court, in each of the aforementioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a District Judge, and shall hold annually four sessions, the first of which to commence as follows, to wit: * * * in the district of Maryland, alternately at Baltimore and Easton, beginning at the first; in the district of Virginia, alternately at Richmond and Williamsburgh, beginning at the first; * * *"

> "SEC. 4. AND BE IT FURTHER ENACTED, That the beforementioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle and the southern circuit. * * * the middle circuit shall consist of the districts of New Jer-

> sey, Pennsylvania, Delaware, Maryland and Virginia; * * *, and that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum * * *"
>
> "SEC. 5. AND BE IT FURTHER ENACTED, That the first session of the said circuit court in the several districts shall commence at the times following, to wit: * * * in the district of Maryland, alternately at Annapolis and Easton, beginning at the first; in the district of Virginia, alternately at Charlottesville and Williamsburgh, beginning at the first; * * *"

"On the first Monday of December, 1800, the District of Columbia, by law, and in fact, became the seat of the Government of the United States. * * * On that day, therefore, * * * the District of Columbia became vested in the Congress and Government of the United States." (*U. S.* v. *Hammond*, 1 Cranch C. C. 15.) Although the assumption by Congress of exclusive jurisdiction over the area in question could not affect the constitutional rights of the persons therein residing since, as stated in *Downes* v. *Bidwell* (182 U. S. 244, 261), "the mere cession of the District of Columbia to the Federal Government * * * did not take it out of the United States or from under the ægis of the Constitution," nevertheless Congress very soon made a change in the forums exercising Federal jurisdiction over the territory. By the Act of February 13th, 1801 (2 Stat. 89), entitled "An Act

to Provide for the More Convenient Organizations of the Courts of the United States," twenty-two instead of the original thirteen districts were established with six instead of the original three circuits of the Judiciary Act. Among the new districts is found the district of Potomac created by Section 21 of the act, following:

> "SEC. 21. AND BE IT FURTHER ENACTED, That for the better dispatch of the business of district courts of the United States, in the districts of Jersey, Maryland, Virginia, and North Carolina, additional district courts shall be established therein, in manner following; * * * And a new district shall be established, in the districts of Maryland and Virginia, to consist of the territory of Columbia, of all that part of the District of Maryland which lies west and southwest of the river Patuxent, and of the western branch thereof, and south of the line which divides the county of Montgomery in the last mentioned district, from the county of Frederick, and of a line to be drawn from the termination of the last mentioned line, a northeast course to the western branch of the Patuxent; and of all that part of the district of Virginia, which lies north of the river Rappahannock, and east of the line which divides the counties of Fauquier and Loudon, in the last mentioned district from the counties of Fairfax, Prince William and Stafford; which new district shall be called the district of Potomac, and a district court in and for the same, shall be holden at Alexandria, by the district judge for the district of Maryland * * * which said courts, hereby directed to be holden, shall sev-

> erally and respectively have and exercise, within their several and respective districts, the same powers, authority, and jurisdiction, in all cases and respects whatsoever, which are vested by law in the district courts of the United States."

According to present geography, this district included the District of Columbia, the counties of Montgomery and Prince Georges, part if not all of Charles, and part of each of Anne Arundel and St. Marys counties, in Maryland, and the counties of Alexandria, Fairfax, and Prince William and part of Stafford County, in the State of Virginia. Organization of the court for this district was at least partially effected, not however by the district judge for the district of Maryland as provided in the act, but as will be seen by the chief judge of the Circuit Court of the District of Columbia.

Then came the act of February 27, 1801 (2 Stat. 103), creating the circuit court of the District of Columbia, providing:

> "SEC. 1. BE IT ENACTED * * *, That the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid."
>
> "SEC. 2. AND BE IT FURTHER ENACTED, That the said District of Columbia shall be formed

into two counties; one county shall contain all that part of said district, which lies on the east side of the river Potomac, together with the islands therein, and shall be called the county of Washington; the other county shall contain all that part of said district which lies on the west side of said river, and shall be called the county of Alexandria; * * *."

"SEC. 3. AND BE IT FURTHER ENACTED, That there shall be a court in said district, which shall be called the Circuit Court of the District of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States. Said court shall consist of one chief judge and two assistant judges resident within said district, to hold their respective offices during good behavior; any two of whom shall constitute a quorum; and each of the said judges shall, before he enter on his office, take the oath or affirmation provided by law to be taken by the judges of the circuit courts of the United States; and said court shall have power to appoint a clerk of the court in each of said counties, who shall take the oath and give a bond with sureties, in the manner directed for clerks of the district courts in the act to establish the judiciary of the United States."

"SEC. 4. BE IT FURTHER ENACTED, That the said court shall, annually, hold four sessions in each of said counties, * * *."

"SEC. 5. BE IT FURTHER ENACTED, That said court shall have cognizance of all crimes and offences committed within said district, and of

> all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

It is clear that the "Circuit Courts of the United States" referred to in Section 3 of this act are the courts created by the act of February 13th, 1801, *supra*, as will be seen by the language of Thompson, J., in *Kendall* v. *U. S.*, 12 Peters 522:

> "And the power in the court below to exercise this jurisdiction, we think, results irresistibly from the third section of the act of the 27th of February, 1801, which declares that the said court, and the judges thereof, shall have all the powers by law vested in the circuit courts of the United States. The question here is, what circuit courts are referred to. By the Act of the 13th of February, 1801, the circuit courts established under the Judiciary Act of 1789 were abolished, and no other circuit courts were in existence except those established by the act of the 13th of February, 1801. * * * The question admits of no other answer than that it must be some existing law, by which powers are vested, and not a law which had been repealed. And there was no other law in force, vesting powers in circuit courts, except the law of the 13th of February, 1801."

A few days after the passage of the above act, Congress on March 3rd, 1801, passed an act supplemen-

tary to it (2 Stat. 115, Chap. 24), vesting in the Circuit Court for the District of Columbia certain powers theretofore vested in the county and levy courts of Maryland and Virginia "respecting constables, inspectors, and the inspection of tobacco and flour, surveyors, mills, highways and ferrys"; and providing among other things that the "circuit court for the said county of Alexandria shall possess and exercise the same powers and jurisdiction, civil and criminal, as is now possessed and exercised by the District courts of Virginia". While this statute represents an inpouring into the circuit court of the legislative power of Congress under Article I, Section 8, of the Constitution, there was passed on the same day an act (2 Stat. 123) which, as a clear reposition of the judicial power of the United States in the circuit court or at least in its chief judge, is of a more especial interest here. Section 7 of the act provides:

> "That the chief judge of the district of Columbia, shall hold the district courts of the United States in and for the district of Potomac, and shall have, exercise and perform, within the said district of Potomac, all the powers and duties now possessed, exercised and performed by the district judges of the United States within their respective districts."

Pursuant to this authority Chief Judge Kilty of the Circuit Court of the District of Columbia in April, 1801, just a few days before he opened the first session of the circuit court in Alexandria for that county of the District of Columbia, organized the district court for the district of Potomac, appointing George De-

neale clerk of the court and George Dent as marshal for the district. A session for admiralty purposes was then held, a record of which still remains. This court appears to have held only two terms, April and October, 1801, and as will be noticed, came to an end with the repeal of the act of February 13th, 1801, the succeeding year. At this period, therefore, the persons residing in the territory of Columbia for the adjudication of their controversies involving the judicial power of the United States were provided with two tribunals, the district court at Alexandria for the district of Potomac having jurisdiction not only of the territory of Columbia but of the contiguous counties as described above, and the Circuit Court of the District of Columbia exercising the jurisdiction of a United States circuit court but only within the limits of the national seat of government.

If the Circuit Court of the District of Columbia was not a constitutional court then there was no constitutional court (for circuit matters) exercising the judicial power of the United States within that area and the persons residing therein had lost their constitutional right to have their Federal controversies adjudicated by judges whose requisite independence was secured by the guaranties of the Constitution. That the Circuit Court of the District of Columbia was created by Congress in virtue of Article III, Section 1, of the Constitution as well as Article I appears from the fact that its chief judge was commissioned to hold the District Court for the District of Potomac in substitution of the district judge for the District of Maryland as first provided, and did actually hold an admi-

ralty session of that court. Inasmuch as the District of Potomac included territory over which Congress had no right of exclusive legislation as within the territory of Columbia, the District Court for the District of Potomac was unquestionably a constitutional court established under Article III, Section 1, of the Constitution; and accordingly such court could only be held by a judge appointed for life and whose salary could not be diminished during his term in office.

Ultimately, by Act of March 8, 1802 (2 Stats. L., 132), the Acts of February 13, 1801, and of March 3, 1801 (requiring the chief judge of the Circuit Court of the District of Columbia to hold the District Court for the District of Potomac as aforesaid), were severally repealed from and after July 1, 1802, and all the acts and parts of acts in force before the passage of the aforesaid two acts, and which by the same were either amended, explained, altered, or repealed were revived in as full and complete force and operation as if the said two acts had never been made. This act spelled the end of the short-lived court for the District of Potomac, at least so far as it included the contiguous counties lying outside of the District of Columbia limits and included in the old District of Potomac.

Before July 1st, 1802, the date on which the act of repeal of March 8th, 1802, was limited to take effect, Congress, anticipating the hiatus and defects in the judicial system which would result, passed on April 29th, 1802, "An Act to Amend the Judicial System of the United States" (2 Stat. 156), Section 24 of which provided:

> "That the chief judge of the District of Columbia, shall hold a district court of the United States, in and for the said district, * * *; which court shall have and exercise, within the said district, the same powers and jurisdiction which are by law vested in the district courts of the United States."

Other than this no provision was made in this act or in the repealing Act of March 8th, 1802, respecting the Circuit Court of the District of Columbia whose jurisdiction was defined in terms of the circuit courts of the Act of February 13, 1801, then legislated out of existence. It was soon held, however, that the repeal of the Act of February 13th, 1801, did not affect the Circuit Court of the District of Columbia:

> "Although the Act of February 13, 1801, was repealed by the Act of 1802, yet the repeal did not in any manner affect the powers or jurisdiction of this Court, given by the Act of February 27, 1801. * * * But so far as the extent of the powers vested in this Court by the act of that date is concerned, it is perfectly immaterial whether the reference in the third section of the Act is to the powers given to the circuit courts of the United States by the Act of the 13th of February, 1801, or by the Judiciary Act of the 24th, of September, 1789, for the powers are the same; * * * The Act of the 13th of February, continued in full force until the 1st of July, 1802. From the 27th of February, 1801, to the 1st of July, 1802, therefore, there could be no doubt as to the extent of the powers of this court; and the construction of the Act of the 27th of February, 1801, must be the same now as it was then, unless it

> has been altered by some act subsequently passed. None has since been passed, in any manner restricting the powers of this Court as they then existed. We still have, as we had then, all the powers which were by the 14th section of the Judiciary Act of 1789, vested in the circuit courts of the United States; * * * But none of our powers are derived from, or dependent upon, the Act of the 13th of February, 1801, or the Judiciary Act of 1789. The 3d section of the Act of the 27th of February, 1801, does not refer expressly to any particular act of Congress, but to the powers which were then, by law, vested in the circuit courts, and the judges of the circuit courts of the United States. * * * As the Act of the 27th of February, 1801, was not in any manner dependent on that of the 13th of February, the repeal of the latter could not affect the former." Cranch, J., in *Kendall* v. *U. S.*, 5 Cranch C. C. 163, 185, 252, 253 and 254.

On appeal to the Supreme Court of the United States, Thompson, J., in delivering the opinion of the majority of the court said:

> "The question (as to what law was referred to in the 3d section of the Act of the 27th of February, 1801) admits of no other answer than that it must be some existing law, by which powers are vested, and not a law which had been repealed. And there was no other law in force, vesting powers in circuit courts, except the law of the 13th of February, 1801. And the repeal of this law, fifteen months afterwards, and after the court in this district had been organized and gone into operation under

> the Act of the 27th of February, 1801, could not, in any manner, affect that law, any further than was provided by the repealing act." *Kendal* v. *U. S.*, 12 Peters 524, 625.

The Act of April 29th, 1802, was the last legislation materially affecting the Circuit Court of the District of Columbia for over thirty years. The later statutes of significance are noticed in the plaintiff's brief. The powers and jurisdiction of the Circuit Court passed by the Act of March 3rd, 1863, to the Supreme Court of the District of Columbia, establishing that court. If it be held that the present Supreme Court of the District of Columbia is not a constitutional court then neither was its predecessor; it would follow also that there is no constitutional court for the area of the United States known as the District of Columbia, nor has there been since the Act of February 27th, 1801, establishing the old circuit court. If then the persons residing in the District of Columbia, as also a great number of persons whose judicial controversies have their legal situs in the District, have lost their original right as citizens of the United States to apply to constitutional courts for the determination of their controversies involving the judicial power of the United States, then the question must be answered, at what time, and in virtue of what statute was that right lost. It is respectfully submitted that none of the Acts of Congress herein considered were so intended or should or can be given that effect.

In our main brief (pp. 44-45) we quoted the protest of Chief Justice Taney in 1863 against the reduction by taxation of the salaries of judicial officers. In 1869,

Attorney General Hoar (13 Op. A. G. 161) held that the tax was illegal and it was not further collected. Subsequently the Congress refunded to all of the justices of this Court the amounts deducted (*Wayne* v. *United States*, 26 Ct. Cls. 274-290). Similar refunds were made to the judges of the Supreme Court of the District of Columbia in 1872. This may be taken as a concurrence by the executive and legislative departments in the opinion of Chief Justice Taney not only that the deductions were unconstitutional but that there was no distinction between the judges of the Supreme Court of the District of Columbia and other Federal judges.

Respectfully submitted,

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CHARLES

Nos. 728, 729, and 730

In the Supreme Court of the United States

OCTOBER TERM, 1932

THOMAS S. WILLIAMS

v.

THE UNITED STATES

DANIEL W. O'DONOGHUE

v.

THE UNITED STATES

WILLIAM HITZ

v.

THE UNITED STATES

ON CERTIFICATES FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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ON CERTIFICATES FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims has rendered no opinion.

JURISDICTION

The certificates of the Court of Claims were filed February 24, 1933. The jurisdiction of this Court

rests on Section 3(a) of the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions certified in the three cases may be combined as follows:

1. Does Section 1, Article III, of the Constitution of the United States apply to the Court of Claims and to the Supreme Court and Court of Appeals of the District of Columbia and forbid a reduction of the compensation of the Judges thereof during their continuance in office?

2. Does the provision of Section 2, Article III, of the Constitution, wherein it is stated that "The judicial Power shall extend * * * to Controversies to which the United States shall be a party", apply to the Court of Claims, and does this provision authorize the creation and establishment of that Court?

3. Can the compensation of a Judge of the Court of Claims or of the Supreme Court or Court of Appeals of the District of Columbia be lawfully diminished during his continuance in office?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution involved in these cases are set forth in the Appendix (*infra*, pp. 12–13).

STATEMENT

The facts stated in the certificates may be summarized as follows (No. 728, R. 1–4; No. 729, R. 1–3; No. 730, R. 1–3):

The plaintiffs are a Judge of the Court of Claims, a Justice of the Supreme Court of the District of Columbia, and a Justice of the Court of Appeals of the District of Columbia, respectively. By the Act of June 30, 1932, c. 314, 47 Stat. 382, 399–403, the salaries of certain officers and employes of the United States were reduced. By a ruling of the Comptroller General this statute was held applicable to the Judges of the Court of Claims, and to the Justices of the Supreme Court and the Court of Appeals of the District of Columbia. Pursuant to this ruling, the plaintiffs have since July 1, 1932, been paid at the reduced rate provided in the statute.

The plaintiffs brought separate suits in the Court of Claims for the difference between the amount which they received at the time the respective suits were brought and the amount each would have received during that period had his compensation not been reduced. The defendant demurred to each petition and the Court of Claims thereupon certified to this Court the questions which have been stated above.

SUMMARY OF ARGUMENT

The plaintiffs contend that they are Judges of constitutional courts created by Congress under the provisions of Section 1 of Article III of the Constitution and that accordingly their salaries may not be diminished during their continuance in office. Obviously the constitutional provisions in

question must be construed in the light of their history and of the development of our institutions and not without reference to the distinction which has so clearly been drawn between constitutional and legislative courts.

This Court's decision in *Ex parte Bakelite Corporation,* 279 U.S. 438, is a direct and conclusive authority against the contention of the plaintiffs. In that case both the Court of Claims and the courts of the District of Columbia were considered and expressly held to be legislative courts. Even if that decision is to be regarded as decisive only with respect to the Court of Customs Appeals with which it was primarily concerned, the reasoning of the opinion leaves no room for the contention made by the plaintiffs here.

It is, of course, well recognized that a constitutional court may not be empowered to determine legislative or administrative questions. Congress has repeatedly conferred such powers upon the Court of Claims, and their exercise by that court has not been questioned. Similar powers have been vested in and exercised without question by the courts of the District of Columbia.

ARGUMENT

The contention of the Judges who instituted these suits before the Court of Claims is that they are Judges of constitutional courts created by Congress under the provisions of Section 1 of Article III of the Constitution of the United States, and

that accordingly their salaries may not be diminished during their continuance in office.

Section 1 of Article III of the Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Obviously these provisions of the Constitution are not to be construed without reference to the history and development of our institutions, and to the distinction which in the application of these provisions has been so clearly drawn between constitutional and legislative courts.

In *Ex parte Bakelite Corporation,* 279 U.S. 438, this Court had occasion to interpret Section 1 of Article III of the Constitution in the light of its history and its application to courts of the United States. The constitutional status of the Court of Claims, and of the courts established by Congress for the District of Columbia, was exhaustively examined, and it was concluded that all of these courts were legislative courts, not constituted under Section 1 of Article III of the Constitution, and therefore not subject to the limitations of that section.

True, the ultimate decision in the *Bakelite case* was that the Court of Customs Appeals is a legislative court. But in reaching that conclusion this Court found it necessary in its interpretation of Section 1 of Article III to trace the history of its application in the development of our judicial institutions and of the distinction repeatedly recognized in the decisions of this Court between constitutional courts and legislative courts.

It was necessary to that decision to analyze the previous decisions of this Court in order to determine the characteristics of a legislative court. As the result of careful and exhaustive analysis, legislative courts were defined as: (1) courts created by Congress by virtue of its power "to exercise exclusive legislation over the District made the seat of the Government of the United States"; (2) courts created by virtue of the power of Congress to make all needful rules and regulations respecting the territory belonging to the United States; and (3) courts created as special tribunals to examine and determine various matters arising between the Government and others, which from their nature do not require judicial determination and yet are susceptible of it.

It was necessary, in formulating this test and analysis of the constitutional power of Congress to establish legislative courts, to consider the courts which Congress has thus established, and the decisions of this Court characterizing them as legisla-

tive courts, including the Court of Claims and the courts provided by Congress for the District of Columbia. The decision of the Court was rested upon this analysis, and it was held that the courts provided by Congress for the District of Columbia, created by virtue of the power of Congress to legislate for the District, were legislative courts, and that the Court of Claims, created and maintained as a special tribunal to examine and determine claims for money against the United States, was also a legislative court.

If we are right in regarding the conclusion of this Court in the *Bakelite case* with respect to the constitutional status of the Court of Claims and of the courts established by Congress in the District of Columbia as necessary to the decision of that case, then we see no escape from the conclusion that that decision is controlling here upon the principle of *stare decisis.*

The principles declared in the *Bakelite* decision were reiterated and applied by this Court in *Crowell* v. *Benson*, 285 U.S. 22, 50:

> Thus the Congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals "to examine and determine various matters, arising between the government and others,

> which from their nature do not require judicial determination and yet are susceptible of it". But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals". *Ex parte Bakelite Corp.*, 279 U.S. 438, 451.

Both the majority and minority opinions in the *Crowell case* accept the *Bakelite case, supra*, as authoritative in its analysis of the distinctions between legislative and constitutional courts. See 285 U.S. at 57–58, 86–91.

In *Miles* v. *Graham*, 268 U.S. 501, this Court's attention was not drawn to the question whether the Court of Claims is a statutory court or a constitutional court. That question was neither presented in the briefs or argument nor considered in the opinion, and accordingly this Court declared in *Ex parte Bakelite Corp., supra*, that the decision in *Miles* v. *Graham* could not be taken as disturbing the earlier rulings of this Court or attributing to the Court of Claims any status other than that of a legislative court. *Ex parte Bakelite Corp.*, 279 U.S. 438, 455.

Accordingly, we believe that conclusion must follow from the decision and the careful analysis of prior decisions of this Court in *Ex Parte Bakelite Corp.*, and from the reaffirmation of the principles upon which those decisions rest in *Crowell* v. *Benson*, that the Court of Claims is a legislative

court created by Congress as a special tribunal to examine and determine claims against the United States, and that the Supreme Court and the Court of Appeals of the District of Columbia, created by virtue of the power of Congress "to exercise exclusive legislation over the District", are also legislative courts. This conclusion is buttressed by the fact that Congress and this Court have so regarded and treated them.

It is, of course, well recognized that a constitutional court may not be empowered to determine legislative or administrative questions.[1] Congress has repeatedly conferred such powers upon the Court of Claims, and their exercise by that court has not been questioned.[2] Similar powers have been vested in and exercised without question by the Supreme Court and the Court of Appeals of the District of Columbia,[3] and the tenure of judicial

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[1] *Hayburn's Case*, 2 Dallas 409; *United States* v. *Ferreira*, 13 Howard 40; *Gordon* v. *United States*, 2 Wallace 561, 117 U.S. 697; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464.

[2] See Sections 12 and 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, 507; Act of June 25, 1910, c. 409, 36 Stat. 837; Judicial Code, Sec. 151; *In re Sanborn*, 148 U.S. 222; *Widmayer* v. *United States*, 42 C.Cls. 519; *Montgomery* v. *United States*, 49 C.Cls. 574.

[3] *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464. The advisory power of the District of Columbia courts in patent cases began as early as the Act of March 3, 1839, c. 88, secs. 11, 13, 5 Stat. 353, 354–355.

office in the inferior courts of the District has been limited by Congress to stated terms.[4]

This Court has thus repeatedly recognized that the power of Congress, in legislating for the courts of the District of Columbia and for the Court of Claims is free of the limitations imposed by Article III of the Constitution. This does not mean that the tribunals in question are not courts, or that they do not exercise judicial power. The exercise of judicial power is common to both legislative and constitutional courts and determines the status of neither. As this Court said in *Ex parte Bakelite Corporation,* 279 U.S. 438, 449:

> it long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts * * *.

CONCLUSION

Conclusion follows that Section 1 of Article III of the Constitution does not apply to the Court of Claims nor to the courts of the District of Columbia so as to forbid a reduction of the compensation of the Judges thereof during their continuance in office, that the provision of Section 2 of Article III of the Constitution does not apply to the Court of Claims, and that the compensation of Judges of the

[4] Act of February 27, 1801, c. 15, secs. 3, 11, 12, 2 Stat. 103, 105, 107; D.C. Code, secs. 3, 42, 60, 221; Act of February 17, 1909, c. 134, 35 Stat. 623.

Court of Claims and of the courts of the District of Columbia may be lawfully diminished during their continuance in office.

In No. 728 the first two questions certified should be answered in the negative and the third in the affirmative. In Nos. 729 and 730 the first question certified should be answered in the negative and the second in the affirmative.

Respectfully submitted.

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APRIL 1933.

APPENDIX

Article I, Section 8, of the Constitution provides in part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *.
>
> * * * * *
>
> To constitute Tribunals inferior to the supreme Court;
>
> * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the government of the United States * * *.
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III of the Constitution provides in part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold

their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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SUPREME COURT OF THE UNITED STATES.

Nos. 729 and 730.—October Term, 1932.

Daniel W. O'Donoghue, *vs.* The United States. William Hitz, *vs.* The United States.	On Certificates from the Court of Claims.

[May 29, 1933.]

The Chief Justice, Mr. Justice Van Devanter, and Mr. Justice Cardozo, dissenting: We are of the opinion that the courts of the District of Columbia, as this court has repeatedly declared, are not courts established under section 1 of Article III of the Constitution, but are established under the broad authority conferred upon the Congress for the government of the District of Columbia by paragraph 17 of section 8 of Article I. Hence, the limitations imposed by section 1 of Article III, with respect to tenure and compensation, are not applicable to judges of these courts. The special authority conferred for the government of the District of Columbia necessarily includes the power to establish courts deemed to be appropriate for the District (*Kendall* v. *United States*, 12 Pet. 524, 619), including the power to fix and alter tenure and compensation. It is a power complete in itself and derives nothing from section 1 of Article III. It is a power not less complete, but essentially the same as that which is conferred upon the Congress for the government of territories. *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546; *McAllister* v. *United States*, 141 U. S. 174. It is not a dual power in the sense that it is derived from two sources, that is, both from Article III and also from the constitutional provision for the government of the District, but is dual only in the sense that the latter provision confers an authority so broad that it enables the Congress to invest the courts of the District not only with jurisdiction and powers analogous to those of federal courts within the States but also with jurisdiction and

powers analogous to those which States may vest in their own courts. As the courts of the District do not rest for their creation on section 1 of Article III, that creation is not subject to any of the limitations of that provision. Nor would those limitations, if considered to be applicable, be susceptible of division so that some might be deemed obligatory and others might be ignored. If the limitations relating to courts established under section 1 of Article III applied to the courts of the District of Columbia, they would necessarily prevent the attaching to the latter courts of jurisdiction and powers of an administrative sort. It is only because the Congress, in establishing the courts of the District of Columbia, is free from the limitations imposed by section 1 of Article III that administrative powers can be, and are, conferred upon them. *Keller* v. *Potomac Electric Company*, 261 U. S. 428, 442, 443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700; *Ex parte Bakelite Corporation*, 279 U. S. 438, 450.

With the question of policy, this court is not concerned, save as policy is determined by the Constitution. The question is one of constitutional interpretation which has hitherto been deemed to be settled.